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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1973

No. 74-13

GARRELL S. MULLANEY, ET AL,
Petitioners

v.

STILLMAN E. WILBUR, JR.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RICHARD S. COHEN
DEPUTY ATTORNEY GENERAL
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AUGUSTA, MAINE
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners, Garrell S. Mullaney, et al, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on April 30, 1974.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court was issued June 8, 1971, and is reported at 278 A.2d 139; the opinion of the District Court for the Southern Division of the District of Maine was issued September 29, 1972, and is reported at 349 F. Supp. 149; the original opinion of the Court of Appeals was issued February 14, 1973, and is reported at 473 F.2d 943; the opinion of the Court of Appeals on remand from this Court pursuant to its order entered January 14, 1974, was issued April 30, 1974, and is not yet reported. This most recent Court of Appeals opinion appears in the Appendix to this petition.

JURISDICTION

The latest judgment of the Court of Appeals for the First Circuit was entered on April 30, 1974. This petition was filed within 90 days

of that date. A stay of order has been granted by the District Court for the Southern Division of the District of Maine pending final disposition of this matter by this Court. This Court's jurisdiction is invoked under 28 U.S.C. §1245 (1).

QUESTIONS PRESENTED

1. Whether it violates the Due Process Clause of the United States Constitution to charge a jury, in a case of felonious homicide, that if they find on the evidence produced, from whatever source, that the State has established beyond a reasonable doubt an intentional and unlawful killing perpetrated by the defendant, the law presumes that homicide to have been committed with malice aforethought and that the burden is upon the defendant to convince them, by a preponderance of all the evidence, that the reductive factor of heat of passion on sudden provocation is present to warrant punishment of that felonious homicide as voluntary manslaughter rather than murder.

STATUTORY PROVISIONS INVOLVED

Maine Revised Statutes, Title 17:

§2651. Definition (MURDER)

"Whoever unlawfully kills a human being with malice aforethought either express or implied is guilty of murder and ***."

§2551. Definition (MANSLAUGHTER)

"Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, ..., shall be punished...,"

STATEMENT OF THE CASE

Defendant (Wilbur) appealed his conviction for felonious homicide punishable as murder to the Maine Supreme Judicial Court. Among other allegations, not here relevant, he alleged that the presiding justice at his trial erred when he charged the jury to the effect that if it was satisfied that the State had proven beyond a reasonable doubt an

intentional and unlawful killing, malice aforethought was "presumed" and the defendant would be guilty of murder, rather than manslaughter, unless he established, by a fair preponderance of the evidence, that he had killed in the heat of passion upon sudden provocation. For our present purposes this claim presented a single issue:

> Whether in thus placing the burden on the defendant to show, even by a preponderance of the evidence, the absence of malice aforethought, the Court denied him due process of law under the rule of In re Winship, 397 U.S. 358 (1970).

The Maine Court rejected any possible Winship violation on two grounds. First, it saw "no occasion to anticipate" that Winship would be applied retrospectively. State v. Wilbur, (Me. 1971) 278 A.2d 139, 146.[1]

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[1] Winship has been made retroactive by the case of Ivan V. v. City of New York, 407 U.S. 203 (1972).

Second, it felt that there would be an unwarranted extension of Winship if it were made to apply to a presumption of malice arising from proof beyond a reasonable doubt of an intentional and unlawful killing, since after such proof, the issue is no longer guilt or innocence of felonious homicide (and therefore there remains no issue as to criminality) but rather the degree of the homicide. In arriving at this conclusion, the Maine Court gave a comprehensive history of the law of felonious homicide as it has existed in Maine for over 125 years. State v. Wilbur, supra at 144-146.

Defendant then petitioned the United States District Court for the District of Maine for a writ of habeas corpus pursuant to 28 U.S.C. §2241 et seq. Defendant claimed a violation of his constitutional rights on several grounds, only one of which was deemed

to be of sufficient merit to be heard by the District Court; this was his Fourteenth Amendment (due process) claim just mentioned.

In its opinion sub nomine Wilbur v. Robbins,[2] 349 F. Supp. 149 (1972), the District Court rejected the theory of felonious homicide as constituting a viable part of the Maine law and proceeded to interpret the Maine criminal statutes relating to the definitions of murder and manslaughter on their face, without the aid of any State Court interpretation, concluding that Winship was applicable and due process violated. Wilbur v. Robbins, at 152, 153. The State seasonably appealed to the United States Court of Appeals for the First Circuit.

Prior to the decision of the First Circuit, the case of State v. Rollins, (Me. 1972)

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[2] After the District Court Opinion but before the First Circuit Court Opinion, Warden Robbins was replaced by Warden Mullaney.

295 A.2d 914 was decided. Rollins once again traced the history and theory of felonious homicide as it developed in Maine and reaffirmed the principles announced in State v. Wilbur, (Me. 1971) 278 A.2d 139. From the Wilbur and Rollins decisions the State (your Petitioners) extrapolated and presented to the First Circuit the following:

1. From the inception of Maine's statehood to the present the laws defining murder and manslaughter have been set forth in separate statutes.

2. However, in 1854 in the case of State v. Conley, 39 Me. 78, the Court, relying upon the common law and notwithstanding the statutes, explicitly established as the law of Maine:

> "When a party is charged in an indictment with the crime of murder, the felony actually committed is the same, whether it has all the elements of murder in the first or second degree, or whether it is wanting in the criterion of murder and is therefore manslaughter only. The two lower degrees of felonious homicide are embraced in the higher offense," Id. at 88, 89.

Thus in Maine law there was established a single underlying criminal entity as at the common law--felonious homicide--within which were fixed three degrees, two under the label of "murder" and a third lower degree denominated "manslaughter", for purposes of advance punishment differentiations.[3]

3. This interpretation was reaffirmed in the case of State v. Knight, 43 Me. 11, 137 (1857) in face of an attack substantively similar to that made in the instant case.

4. The statutes in Maine have never been altered by the legislature in any manner suggestive of an intention by the legislature to

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[3] Maine no longer has first and second degree murder. Thus the only degrees of felonious homicide which now exist are "murder" and "manslaughter".

repudiate the common law concepts as held by Conley and Knight, to be statutorily codified as the law of Maine, i.e. that there is a single generic crime, "unlawful (felonious) homicide," of which degrees, for penalty purposes, are designated by the names "murder" and "manslaughter".

5. Thus the rationale which has allowed the principle that the State has the ultimate burden to prove all essential elements of any crime beyond a reasonable doubt to exist side-by-side with the idea that the defendant must bear the ultimate burden of proof to reduce "murder" to "manslaughter" is that "murder" and "manslaughter" do not delineate separate crimes but are designations of the "degrees", for the purpose of establishing penalty consequences, of a single underlying crime--"unlawful (felonious) homicide."

The Court of Appeals affirmed the decision of the District Court on February 14, 1973.

The Court of Appeals rejected the theory of felonious homicide as announced by the Maine Court and went back into the Maine law to point out how the Maine Court was, at best, in error in interpreting its own law and, at worst, was attempting to come up with a new interpretation to escape the requirements of Winship. The Circuit Court then relied upon the wording on the face of Maine's statutes relating to "murder" and "manslaughter" and upon the casual language of certain cases existing in Maine's law to supply what it thought should be the proper interpretation of Maine's homicide law.

On April 26, 1973, the State (Petitioners) filed a petition for writ of certiorari with this Court praying that a writ of certiorari issue to review the judgment and opinion of the First Circuit of February 14, 1973. This petition was assigned Supreme Court Docket No. 72-1462.

After the filing of the petition for writ of certiorari by the Petitioners, the Maine Supreme Judicial Court decided the case of State v. Lafferty, (Me. 1973) 309 A.2d 647. In substance, Lafferty, while noting certain exceptions, rejected the right of the First Circuit to be the final arbitor of the internal criminal law of the State of Maine; it went on to reaffirm the substantive law of felonious homicide as announced in the earlier decisions.

As a result of the Lafferty decision, your Petitioners, on September 26, 1973, filed a supplemental brief to their petition for certiorari which was still pending before this Court. The supplemental brief explained the significance of the Lafferty decision as it related to the issue of federal/state relationships involved in the original petition.

On January 14, 1974, this Court granted a petition for certiorari in this case wherein

it vacated the February 14, 1973, opinion of the First Circuit and remanded the case back to the First Circuit for further consideration in light of the Lafferty decision.

In response to this Court's remand, the issue was resubmitted to the First Circuit with the resultant decision, reproduced in the Appendix to this petition, of April 30, 1974. In its decision on remand the First Circuit:

1. Accepted the position of the Maine Court that there exists in Maine a single crime, to wit: "unlawful (felonious) homicide" as announced in several decisions of the Maine Court, culminating with State v. Lafferty, (Me. 1973) 309 A.2d 647.

2. Found that In re Winship, 397 U.S. 358 (1970), and its holding that the due process clause protects the accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged, commands that the Maine procedure of placing the burden on a defendant to mitigate, by a preponderance of the evidence, a prima facie case of felonious homicide punishable as murder (already proven beyond a reasonable doubt) to the lower degree of voluntary manslaughter violates due process of law.

3. Rejected the principle spelled out in State v. Wilbur, (Me., 1971) 278 A.2d 139:

> "[We do not accept the view that] the defendant is required to do no more than generate the issue leaving the State, if it can, to negate the reductive factors by proof beyond a reasonable doubt. We are not persuaded to this view which tends to emasculate the presumption and defeat the very purpose for which sound public policy has raised it... [W]here under stated conditions the presumption of malice is raised, the burden of proof shifts to the defendant to reduce murder to manslaughter." (Emphasis supplied)

4. Concluded that "the burden of proof must be on the State throughout; not sometimes on the State, and sometimes on the defendant."

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES A SIGNIFICANT QUESTION CONCERNING THE SCOPE AND EFFECT OF THE CASE OF IN RE WINSHIP I.E. WHETHER WINSHIP'S HOLDING, THAT DUE PROCESS DEMANDS THAT THE STATE BEAR THE BURDEN OF PROOF, IN A CRIMINAL CASE, BEYOND A REASONABLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE THE CRIME WITH WHICH AN ACCUSED IS CHARGED, SHOULD BE EXTENDED SO AS TO REACH FACTORS BEARING ON MITIGATION OF PUNISHMENT.

As a result of the remand from this Court to the First Circuit of January 14, 1974, and the resultant decision of April 30, 1974, the issue presented in Petitioners' first petition for certiorari (Supreme Court Docket No. 72-1462) relating to the question of the right of the First Circuit to interpret Maine Law, has been resolved in favor of Petitioners. This case now squarely presents to this Court for review the significant constitutional question, raised as the second issue in Petitioners' first petition, *i.e.* the question of the scope of the due process clause and its requirement as announced in *In re Winship*, 397 U.S. 358 (1970), that every fact necessary to constitute the

crime with which an accused is charged be proven beyond a reasonable doubt in order to sustain a conviction.

Starting from the premise of a single generic crime of felonious homicide as it has existed in Maine for well over 100 years, as pointed out in *State v. Wilbur*, (Me. 1971) 278 A.2d 139, *State v. Rollins*, (Me. 1972) 295 A.2d 914, and *State v. Lafferty*, (Me. 1973) 309 A.2d 647, the following conclusions obtain:

1. The *crime* to be proved in every "murder" indictment is felonious homicide, not "murder" or "manslaughter",

2. The elements of the crime of felonious homicide are (a) that the victim is dead; (b) that the defendant killed the victim; (c) that the killing of the victim was done voluntarily by the defendant - that is that the physical act or acts which caused the death were the result of an exercise of the defendant's will as opposed to reflexive or nonvolitional acts;

and (d) that the killing of the victim was unlawful (because it was neither justifiable nor excusable).

3. The law of Maine requires that each and every *fact* necessary to constitute the crime of *felonious* *homicide*, be proven beyond a reasonable doubt.

4. Malice aforethought is not a fact necessary to constitute the crime of felonious homicide but a factor whose presence or absence merely determines the *degree* of felonious homicide for purposes of establishing punishment.

5. The term "presumption of malice" is nothing more than a statement of policy, not related to fact finding, that once an *intentional and unlawful* (felonious) homicide has been proved *beyond a reasonable doubt*, the law will punish that crime most severely unless

mitigated by the defendant. These are matters of defense and not of guilt or innocence, *i.e.* criminality.

6. It bears emphasis that the "presumption of malice" rises upon proof beyond a reasonable doubt of an *intentional* and unlawful (felonious) homicide, not from proof of an unlawful (felonious) homicide alone. The additional requirement of *intent* being susceptible of proof by either the establishment of a *specific subjective intent* to take life or by facts which warrant the jury in inferring the intent to take life. Such *facts* being ones which, when viewed *objectively*, are characterized by a high death producing potential warranting an inference of intent.

7. Once the jury is warranted in finding the intent to take life, the effect of the "presumption of malice" is to indicate to the jury that they have found a prima facie case of felonious homicide *punishable as murder* as

opposed to a felonious homicide punishable as common law manslaughter,[4] or an innocent homicide.[5]

8. The effect of the "presumption of malice" on the defendant is to shift the burden onto him to establish, by a preponderance of the evidence,[6] that though he intentionally killed another human being and would therefor be otherwise guilty of murder, the intentional killing was done in the heat of passion on sudden provocation so as to warrant the punishment of the felonious homicide as voluntary manslaughter.

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[4] The degree of manslaughter not requiring as part of its proof the intent to take life.

[5] An innocent homicide being one which is not unlawful because it is either excused or justified.

[6] The defendant may meet this burden either by the introduction of evidence in defense or by pointing out that the state's case as presented would warrant such a finding.

Other than the instant case, your Petitioners know of no case that has extended the requirements of Winship to factors bearing on mitigation rather than guilt or innocence of the crime charged. The question of whether or not to limit Winship to matters of factual proof bearing upon the question of guilt or innocence, or whether to expand it to include matters of policy and procedure which follow the establishment of guilt, beyond a reasonable doubt, is one of great importance in the law.

Fairly comprised in such a question are such subsidiary questions as:

1. The scope and meaning of due process at a stage of the trial after guilt or innocence has been established and the question remaining being that of punishment only,

2. The effect of Winship upon presumptions, both as methods of factual proof and as mere pronouncements of public policy, and

3. Whether in fact there even exists at the mitigation (punishment) stage of trial any reason for requiring proof beyond a reasonable doubt and for limiting the use for presumptions since the rationale for the establishment of the requirement of proof beyond a reasonable doubt, the presumption of innocence, has been eliminated.

It is respectfully suggested that these and other important questions which exist in this case should be answered by this court.

CONCLUSION

For all of the above reasons a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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VERNON I. AREY
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APPENDIX

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 72-1348

STILLMAN E. WILBUR, JR.,
Petitioner, Appellee,

v.

GARRELL S. MULLANEY, ET AL.,
Respondents, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MAINE

Before COFFIN, Chief Judge,
ALDRICH and McENTEE, Circuit Judges.

Vernon I. Arey, Assistant Attorney General, with whom Fernand LaRochelle, Assistant Attorney General, was on brief, for appellants.

Peter J. Rubin, by appointment of the Court, with whom Bernstein, Shur, Sawyer & Nelson was on brief, for appellee.

OPINION ON REMAND

April 30, 1974

ALDRICH, Senior Circuit Judge. We are faced again with the duty of considering the propriety, in the light of In re Winship, 1970, 397 U.S. 358, of imposing upon a defendant indicted for murder, once an unlawful killing had been shown beyond a reasonable doubt, the burden of proving that his conduct met the statutory definition of manslaughter as distinguished from murder, or, as the Maine court, post, put it, of reducing the degree of the crime from murder to manslaughter.

The facts are these. At the trial the state's case against Wilbur, the present petitioner for a writ of habeas corpus, hereinafter defendant, was based upon circumstantial evidence and defendant's pretrial admissions that he had inflicted such severe

injuries upon the deceased with his fist and a blunt instrument that death had resulted within a few minutes. Although he did not testify or offer any evidence, defendant's theory of defense, as asserted in his pretrial statement introduced in full by the state, was that although he had struck the deceased, it was in the heat of passion suddenly provoked by an indecent homosexual overture, and that, therefore, he had not acted with malice aforethought, and was guilty of manslaughter, not murder. The court instructed the jury that it was the state's burden to prove beyond a reasonable doubt that the defendant had killed the deceased, and that the killing was intentional and unlawful. It also informed the jury that malice aforethought was an "essential and indispensable element of the crime of murder," but it charged that "malice aforethought may ...be implied from an unlawful killing" and "is presumed to be present in all homicides until the contrary appears from the circumstances of alleviation to be made out ["by a fair preponderance of the evidence"] by the defendant."

In In re Winship the Court held that the Due Process Clause requires the state to prove beyond a reasonable doubt "every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. On appeal from his conviction for murder, the instant defendant took the position that malice aforethought, which he equated with premeditation, was an intent more criminal in character than one formed under circumstances recited in the statute defining manslaughter, post, and that such higher intent was an element of the crime of murder and hence part of the state's burden of proof rather than a matter for him to disprove. The Maine court, however, held that under the law of Maine murder and manslaughter were but a single crime, felonious homicide, manslaughter

being a degree thereof; and that the defendant has the burden of proving by a fair preponderance the "reductive factors (sudden provocation and heat of passion)". State v. Wilbur, Me., 1971, 278 A.2d 139, 145. It reasoned that the "policy presumption [of malice], bearing as it does not on the guilt or innocence of felonious homicide but only upon the degree of and possible punishment for such homicide, should be accorded such procedural force as is required to make it truly effective" and that it did not anticipate that "Winship will be so extended as to reach the procedural requirements of Conley and Knight [post] as now interpreted." Id. at 146. On a petition for habeas corpus the district court, and ultimately ourselves, disagreed. Wilbur v. Mullaney, 1 Cir., 1973, 473 F.2d 943.

Therefore, in State v. Lafferty, Me., 1973, 329 A.2d 647, the Maine court rejected both our interpretation of the Maine law and the propriety of our effort to interpret it, as a result of which the Supreme Court, on petition for certiorari, vacated our judgment and ordered us to give "further consideration in light of [Lafferty]."

U.S. (1/7/74).

In our prior opinion we were influenced by the fact that separate statutes defined murder and manslaughter;[1] and by references in State v. Knight, 1857, 43 Me. 11, 33, to murder

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[1] Murder
Section 2651. Definition
Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.
Manslaughter
Section 2551. Definition
Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought,... or commits manslaughter as defined by the common law, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years....

and manslaughter as "offenses ... [which] import different degrees of criminality, and are punished with different degrees of severity," and in State v. Conley, 1854, 39 Me. 78, 88 to manslaughter as "wanting" "all the elements of murder." We now recognize that the separateness of the statutes is not deemed of any ultimate significance by the Maine Supreme Judicial Court and that both Knight and Conley, in addition to the language which earlier impressed us, contain language looking to the unitary nature of the crime embracing both murder and manslaughter, which language the Maine court deems controlling.

That the distinction between separate crimes and degrees of a single crime has not always been clearly conveyed is revealed in the charge given to the jury that convicted Wilbur. The trial court, after announcing that it would "describe the elements of the crimes of murder and manslaughter," which it then did,[2] concluded as follows:

> "Now I have given you the general definitions of the crimes of murder and manslaughter with some further explanations; quoting largely, using largely the language of our court...from which you can see clearly the definitions of the two offenses."

Nevertheless, we now take as a given that there is "a single crime, unlawful (felonious) homicide." Lafferty, ante, 309 A.2d at 663 (Emphasis in orig.). We believe we may have erred in focussing in our previous opinion upon the structure of the Maine law, concededly an internal matter, Memorial Hospital v. Maricopa County, (2/26/74) U.S. ; 42 L.W. 4277, 4279, instead of upon the consequences, from the standpoint of the defendant,

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[2] The court spoke with apparent approval of this portion of the charge. "The jury [was]... thoroughly instructed as to the elements of unlawful homicide, murder and manslaughter." State v. Wilbur, 278 A.2d at 144.

in order to ascertain whether they were of constitutional proportions; or, as the Lafferty court put it, to see that state law as definitively interpreted "trespasses on no federally guaranteed constitutional rights." 309 A.2d at 662. The question is more properly put: does the fact that Maine regards murder and manslaughter as a single crime, denominated felonious homicide, but differing in degree, avoid Winship's strictures protecting "the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" within the Court's intendment?

We start with a consideration of the measure of the difference effected by the concept of "reductive factors" of provocation and heat of passion as to which defendant has the burden. Under Maine law "malice aforethought" is not to be thought of as a general equivalent of premeditation. The term is "not a designation of any subjective state of mind existing *as a fact*." *Lafferty*, ante, 309 A.2d at 664, quoting *State v. Rollins*, Me., 1972, 295 A.2d 914, 920. (Emphasis in orig.) Whether a killing has taken place with the subjective intention that death result (i.e., "a 'premeditated' killing," *Lafferty*, at 670, Wernick, J., concurring) or death has been caused without any specific subjective intent but by reckless or brutal conduct, "malice aforethought," "a fictional, metaphysical term of art" applicable to both acts, may be "extinguished by the fact that heat of passion upon sudden, adequate provocation spawned the conduct." *Id*., 672. Such facts (heat of passion, causation, sudden and adequate provocation) do not eliminate criminality but are "the facts legislatively assigned in advance to bind a judge's sentencing discretion" (*id*., at 667) and "mitigate the blameworthiness of the criminality." *Id*. at 671. Yet there is no question

but that what is required to extinguish "malice aforethought" are factual matters.[3] The contention is that, not being addressed to disproof of criminality but to proof of lesser blameworthiness, the placing of the burden on an accused to prove such factual matters falls beyond the reach of *Winship*.

In determining the constitutionality of a state statute (we draw no distinction between statutory and court-made law) the Court said in *St. Louis Southwestern Ry. Co. v. Arkansas*, 1914, 235 U.S. 350, at 362,

> "Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But...[w]e must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

As recently as *In re Gault*, 1967, 387 U.S. 1, where the state court had construed its statute as providing that certain proceedings were not even criminal, the Court disregarded that conclusion, holding that from the substantive, and hence constitutional standpoint they must be regarded as criminal. It said, at pp. 49-50, "To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience." 387 U.S. at 49-50. See also Duncan v. Louisiana, 1968, 391 U.S. 145.

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[3] Indeed, we may think the fact that it is a circumstance preculiarly within the knowledge of the defendant is one of the reasons for the Maine rule. See 309 A.2d at 664.

In terms of substance the different consequences attaching to manslaughter and murder from the standpoint of the defendant in the state of Maine are obvious. For manslaughter the punishment may range from a nominal fine to "a fine of not more than $1000 or ... imprisonment for not more than twenty years." 17 M.R.S.A. §2551, ante. A defendant convicted of murder "shall be punished by imprisonment for life." 17 M.R.S.A. §2651, ante. In addition, the Lafferty court, 309 F.2d at 673, took

exception to our attaching significance to the fact that the public draws a distinction between a conviction for murder and a conviction for manslaughter, a distinction eloquently noted as far back as Blackstone.[4] The Court, however, in making constitutional assessments in Duncan v. Louisiana, ante, said, at 160, "The penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments.'" We believe we are commanded to consider this factor not only by Duncan, but by Winship itself.

The Winship rationale is explicit.

> "The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that

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[4] See Blackstone, Commentaries on the Laws of England, 178; Malice is the "grand criterion which now distinguishes murder from manslaughter and other forms of killing." (Am. ed. Phila., 1772). See also Mueller, Comparative Criminal Law in the United States 134 (1970).

> he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." 397 U.S. at 363. (Emphasis supplied).

We cannot think that how these substantial differences with respect to liberty and stigma are achieved, vis-a-vis the defendant, is to be dismissed as a mere "procedural requirement," State v. Wilbur, ante, at 146, or, to put it another way, is beyond the reach of Winship, whose expressed holding is that the procedural requirement of burden of proof is a constitutional matter. Whether a defendant is to be regarded as a murderer, to spend his life in prison, or, as guilty of manslaughter, is to serve a term of years, with the possibility of parole -- or possibly only fined -- depends upon the absence, or existence, of certain facts. We cannot accept that simply by calling them "reductive factors" the determination of these facts occurs other than "during a criminal prosecution." Were it otherwise, the important interests that concerned the court in Winship could be diluted to whatever degree judicial or legislative draftsmen might elect.

In holding that a burden of proof cannot be placed upon the defendant by the process of defining the crime we emphasize that we are not deciding that proof of intentional homicide can never justify a finding of murder to the extent that there must necessarily be an acquittal unless the state by evidence affirmatively disproves the existence of factors which would show the offense to be manslaughter. We have no quarrel with a rule that proof of certain facts may justify inferences, and we recognize when a jury is told of a permissive inference arising from the state's evidence unless the defendant makes a showing, or an "explanation," cf. Barnes v. United States, 1973, 412 U.S. 837, that in practical effect it may place upon him a burden of going forward. See Barnes at

846 n. 11. But this cannot be the strict burden of going forward in the sense of going-forward-persuasively-or-else-you-lose. See, e.g., Barnes at 845 n. 9. What we are rejecting is the principle spelled out in State v. Wilbur, 278 A.2d at 146, where the court said,

> "[We do not accept the view that] the defendant is required to do no more than generate the issue leaving the State, if it can, to negate the reductive factors by proof beyond a reasonable doubt. We are not persuaded to this view which tends to emasculate the presumption and defeat the very purpose for which sound public policy has raised it....[W]here under stated conditions the presumption of malice is raised, the burden of proof shifts to the defendant to reduce murder to manslaughter."

Placing the burden on a defendant to reduce murder to manslaughter may be sound public policy if the state's purpose is to facilitate convictions for murder, but Winship teaches that it is constitutionally improper to facilitate convictions at the cost of imposing a burden of proof upon the defendant. The burden of proof must be on the state throughout;

not sometimes on the state, and sometimes on the defendant.

The order affirming the order of the district court is reinstated.

CERTIFICATE OF SERVICE

Pursuant to the Rules of the Supreme Court of the United States, the undersigned, counsel of record for the petitioners, on the date written below, did deposit a copy of the above petition for a Writ of Certiorari in the United States Post Office at Augusta, Maine, first class postage prepaid, addressed to Respondent's attorney as follows: Peter J. Rubin, Esquire, One Monument Square, Portland, Maine 04111.

Dated: July 24, 1974

RICHARD S. COHEN
Deputy Attorney General
State House
Augusta, Maine 04330

Supreme Court, U. S.
FILED
NOV 29 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-13

GARRELL S. MULLANEY, ET AL.,
Petitioners,

— v. —

STILLMAN E. WILBUR, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED JULY 25, 1974
WRIT OF CERTIORARI GRANTED OCTOBER 15, 1974

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-13

GARRELL S. MULLANEY, ET AL.,
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— v. —

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED JULY 25, 1974
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CIVIL DOCKET

UNITED STATES DISTRICT COURT

No. 13-3

Jury demand date:

TITLE OF CASE

STILLMAN E. WILBUR, JR.,
Petitioner

v.

ALLAN L. ROBBINS, Warden,
MAINE STATE PRISON, and
STATE OF MAINE,
Respondents

ATTORNEYS

For Plaintiff:
PETER J. RUBIN
One Monument Square
Portland, Maine
C. J. A.

For Defendant:
VERNON I. AREY
FERAND LAROCHELLE
Assistant Attorneys General
Chief, Criminal Division
State House
Augusta, Maine

(STATISTICAL RECORD, RECORD OF COSTS AND FEES — OMITTED IN PRINTING.)

Date 1971		PROCEEDINGS
Dec.	13	Petition for Writ of Habeas Corpus along with Motion for Leave to Proceed in Forma Pauperis and Affidavit in support thereof, and request for appointment of counsel, filed.
1972		
Jan.	7	ORDER TO SHOW CAUSE * * * that respondents make return to petition on or before Jan. 25, 1972; that petitioner may have until 2/4/72 to file Traverse if he so desires; that no action be taken on motion for leave to proceed in forma pauperis and motion for appointment of counsel, until after return and Traverse have been filed; * * * that petitioner remain in custody pending further order of this court. Gignoux, J. — dated 1/6/72. Filed.
Jan.	7	Attested copies of Order to show cause mailed to parties.
Jan.	25	REPLY TO ORDER TO SHOW CAUSE FILED.
Feb.	3	Traverse filed.
Feb.	7	Transcript of superior court proceedings before Hon. R. Weatherbee received from Stillman Wilbur, Box A, Thomaston, Maine.
Mar.	9	ORDER ON PETITION FOR WRIT OF HABEAS CORPUS; that the petition is dismissed and the writ denied in all respects except for paragraph B(4); that the motion for leave to proceed in forma pauperis is granted as to paragraph B(4); that the Court in its discretion grants request for

		appointment of counsel as to Paragraph B (4) and that Peter Rubin Esq. is so appointed per C.J.A. * * *, Gignoux, J., filed.
Mar.	9	Copies of Order mailed to parties.
Jun.	6	Hearing and oral argument had. Matter taken under advisement.
Sep.	29	OPINION AND ORDER OF THE COURT * * * That petitioner's conviction was obtained in violation of his 14th amendment right to due process of law; that judgment of conviction and sentence imposed upon petitioner by the Franklin County Superior Court is VACATED, and the matter is remanded to that court to afford the State an opportunity to grant petitioner a new trial. In the event of the failure of the State to grant petitioner such relief within 60 days from the date hereof, the writ will be sustained and petitioner ordered discharged from custody. The Clerk will enter an appropriate order in accordance with the foregoing, which Order will provide that the Court will retain jurisdiction over the present petition for the entry of such further orders as may be necessary and appropriate. Dated at Portland, Maine this 29th day of September 1972. Gignoux, J., filed.
Sep.	29	Order vacating Franklin County Superior Court Judgment, remanding matter to that court for new trial, indicating that in event State does not retry petitioner within 60 days petitioner will be discharged from State custody and retaining jurisdiction of matter, Cox, Clerk filed.
Sep.	29	Copies of Order mailed to parties etc.
Oct.	10	Notice of appeal filed by State of Maine and Warden, M.S.P. from Order of 9/29/72.

Oct.	10	Motion for Stay of Order directing State retry petitioner w/in 60 days, filed.
Oct.	11	ORDER STAYING ORDER OF COURT ENTERED 9/29/72, Gignoux, J., filed.
Oct.	18	Motion of Stillman Wilbur to be admitted to bail pending appeal, filed.
Oct.	19	Endorsement: No hearing required; motion denied. Edward T. Gignoux, USDJ, parties notified.
Oct.	24	Original papers on appeal mailed to U.S. Court of Appeals for First Circuit.
Nov.	15	Order of Court of Appeals denying petitioner's motion to be admitted to bail pending appeal, filed.
1973		
Feb.	23	Motion to be admitted to bail w/endorsement thereon. No mandate having issued from the court of appeals, motion denied, without prejudice, Gignoux, J. Filed.
Feb.	27	Answer in opposition to petitioner's motion for bail, filed.
Mar.	12	Opinion of Court of appeals affirming judgment of District Court, filed.
Mar.	12	Order of Court of Appeals dated Mar. 8 denying petitioner's motion for bail w/out prejudice, filed.
1974		
May	1	OPINION ON REMAND dated April 30, 1974 of U.S. Court of Appeals. The order affirming the order of the District Court is reinstated, filed.
May	1	JUDGMENT U.S. Court of Appeals, affirming the order of district court is reinstated.

		Mandate is ordered forthwith. The matter of release on bail is referred to District court, with recommendation that it allow same, irrespective of whether respondent proposes to petition for certiorari, unless the state proposes to retry petitioner at an early date. Costs on this and prior appeal to petitioner, filed.
May	2	Motion for Bail, filed.
May	7	Answer of State in opposition to petitioner's Motion for Bail, filed.
May	10	Motion for Stay of Court's order of Sept. 29, 1972, filed.
May	10	Partial hearing had upon motion for bail—continued for further hearing on May 17, 1974.
May	10	Hearing had upon motion for stay of Court's order of Sept. 29, 1972 — motion granted — order to issue.
May	10	Order staying Court's order of Sept. 29, 1972 pending final disposition of this matter by the U.S. Supreme Court.
May	13	Attested copies of Order mailed to counsel.
May	17	Continued hearing had upon motion for bail. Motion granted w/special conditions, and petitioner released to custody of probation officers of this district.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

APPEAL FROM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

CASE NO. 72-1348

TITLE OF CASE

STILLMAN E. WILBUR, JR.
Petitioner, Appellee,

v.

GARRELL S. MULLANEY et al.,
Respondents, Appellants.

473 F. 2d 943

ATTORNEY FOR APPELLANT
VERNON I. AREY (207) 289-2148
Assistant Attorney General
State House
Augusta, Maine 04330

ATTORNEYS FOR APPELLEE
Court-Appointed:
PETER J. RUBIN
BERNSTEIN, SHUR, SAWYER & NELSON
One Monument Square
Portland, Maine 04111
(207) 774-6291

No. Below: CA 13-3
Judge Below: Gignoux, J.
Date of Order: September 29, 1972
Notice of Appeal Filed: October 10, 1972

[HABEAS CORPUS]

(ACCOUNTING SCHEDULE —
OMITTED IN PRINTING.)

Date 1972		FILINGS — PROCEEDINGS
Oct.	26	Record on appeal in one volume filed and case docketed. Request for appointment of counsel filed. Order (Coffin, Ch.J.) appointing Peter J. Rubin, Esquire, counsel for appellee. Notices mailed.
Oct.	30	Appearance of Peter J. Rubin, court-appointed counsel for appellee filed.
Oct.	31	Supplement to record on appeal consisting of case No. 425 and transcript and exhibits, etc., filed.
Nov.	2	Motions filed. Order (Coffin, Ch.J.) granting leave to omit form reproducing in appendix state transcript of testimony, and granting leave to appellant to file 4 copies of certain pages of transcript. Notices mailed. Motion to be admitted to bail filed by appellee.
Nov.	6	Appearance of Vernon I. Arey for appellants filed. Answer in opposition to petitioner's motion for bail filed. Motion to amend answer in opposition to petitioner's motion for bail filed.
Nov.	7	Order (Coffin, Ch.J.) granting leave to appellants to amend their answer in opposition to petitioner's motion for bail. Notices mailed. Agreement as to contents of appendix filed.
Nov.	14	Memorandum and order (Coffin, Ch.J., Aldrich and Campbell, JJ.) denying motion for bail. Notices mailed.
Nov.	29	Appendix to briefs and brief for appellant filed.

Dec.	14	Brief for appellee filed.
Dec.	22	Reply brief for appellants filed.
Dec.	26	Assigned for hearing at the coming January 1973 session.
1973		
Jan.	3	Heard before Coffin, Aldrich and McEntee, JJ.
Feb.	14	Judgment: The order of the District Court is affirmed. Opinion by Aldrich, J. Notices mailed.
Feb.	21	Motion filed. Order (Coffin, Ch.J.) staying mandate until April 6, 1973. Notices mailed.
Feb.	22	Motion filed. Order (Coffin, Ch.J.) denying motion for reconsideration of order staying mandate. Notices mailed.
Feb.	27	Motion filed. Order (Coffin, Ch.J.) further staying mandate to April 30, 1973. Notices mailed.
Mar.	8	Motion for bail filed. Opposition to motion for bail filed. Order (Coffin, Ch.J., Aldrich and McEntee, JJ.) denying motion for bail. Notices mailed.
Apr.	30	Certified copy of order from Supreme Court of filing petition for certiorari (4/26/73) [No. 72-1462] filed.
1974		
Jan.	18	Order (Aldrich, J.) establishing briefing schedule. Notices sent.
Jan.	21	Motion for bail filed.
Jan.	22	Order (Coffin, Ch.J.) reserving action on motion for bail until consideration of the cause on the merits. Notices mailed.

Feb.	14	Certified copy of order of Supreme Court granting certiorari (1/14/74) filed. Certified copy of order of Supreme Court remanding case (1/14/74) filed.
Feb.	20	Brief for appellee filed. Brief for appellants filed. Submitted on briefs to Coffin, Aldrich and McEntee, JJ.
Apr.	30	Judgment reinstating prior judgment, ordering mandate, referring release on bail to the district court and providing for costs on this appeal and the prior appeal. Opinion by Aldrich, J. Notices mailed. Mandate issued and copy filed, and original papers returned to the district court.
May	7	Motion filed. Order (Coffin, Ch.J. & Aldrich, J.) constructively recalling and reissuing mandate etc. Notices mailed. Appellee's verified bill of costs filed. Order (Coffin, Ch.J.) appointing Peter J. Rubin, Esquire, counsel for appellant. Notices mailed.
May	10	Order (Coffin, Ch.J., Aldrich and Campbell, J.J.) correcting opinion filed on April 30, 1974 by substituting on page 7, line 16, in the parenthesis, the word "Supplied" for the words "in original". Notices to counsel.
Aug.	2	Notice from Supreme Court of filing petition for certiorari (7/25/74) [No. 74-13] filed.

NO. 72-1462-CFH

TITLE

GARRELL S. MULLANEY et al., Petitioners,

v.

STILLMAN E. WILBUR, JR.

DOCKETED
APRIL 26, 1973

COURT
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Date
1973 PROCEEDINGS AND ORDERS

Counsel for Petitioners:
RICHARD S. COHEN

Counsel for Respondent:
SUMNER T. BERNSTEIN

Apr. 26 Petition for writ of certiorari filed.
May 21 Brief for respondent in opposition filed.
May 25 DISTRIBUTED.
Jun. 12 Redistributed.
Jul. 16 Application for bail filed, and denial thereof (White, J., 7-17-73). Opposition thereto (7-17-73).

Aug. 6 Reapplication for bail filed, and denial thereof (Burger, CJ, 8-9-73).
Sep. 27 Supplement to petition filed.
Dec. 28 REDISTRIBUTED.
1974
Jan. 8 Redistributed.
Jan. 14 Petition GRANTED. Adjudged to be VACATED AND REMANDED for further consideration in light of **State** v. **Lafferty**, ______ Me. ______, 309 A. 2d 647 (1973).
Feb. 12 Judgment issued.

NO. 74-13-CFH

TITLE

GARRELL S. MULLANEY et al., Petitioners,

v.

STILLMAN E. WILBUR, JR.

DOCKETED
JULY 25, 1974

COURT
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Date 1974		PROCEEDINGS AND ORDERS
		Counsel for Petitioners: RICHARD S. COHEN
		Counsel for Respondent: HERBERT H. SAWYER
Jul.	25	Petition for writ of certiorari filed.
Aug.	22	Brief for respondent in opposition filed.
Sep.	5	DISTRIBUTED. SL17P2
Oct.	15	Petition GRANTED.

STATE OF MAINE

v.

STILLMAN E. WILBUR, JR.

CHARGE TO JURY

FRANKLIN COUNTY SUPERIOR COURT

JUNE 4, 1966

ORIGINAL TRANSCRIPT PAGES

500-562, 568-591

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(TO FACILITATE READING, OBVIOUS ERRORS IN SPELLING HAVE BEEN CORRECTED IN PRINTING UNLESS TO DO SO WOULD SHADE MEANING OF PHRASE.)

[500]

JUNE 4, 1966.

THE COURT: The record to show the presence in the court room of the defendant and counsel, and the State's attorneys. And the jury may be brought in.

(The jury is seated in the box.)

CHARGE

WEATHERBEE, J.

Mr. Foreman, ladies and gentlemen of the jury, will you rise, please?

I guess it is obvious to anyone attending the trial of a criminal case that the officers of the court; the attorneys, the Court, and the jury each has heavy bur-

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dens of responsibility. The attorneys in this case who are acting as officers of the court, have largely to this point discharged their responsibilities. The time has come for me to undertake my particular, my greatest duty of responsibility in instructing you as to the law which applies to cases; criminal cases in general, and to this case in particular. And when I have finished in a little over an hour from now the responsibility, the heavy responsibility of determining guilt or innocence will pass to the jury.

As those of you who have sat on other juries will remember, the reason that I ask you to stand when I addressed you, when I began to address you a moment ago was that for hundreds of years in Anglo-Saxon countries it has been traditional for the jury to rise when the Judge addresses the jury as a gesture or recognition of the fact that the jury understands that the judge is supreme in deciding what the law is. That it is the duty of the judge to decide the law, to explain the law to the jury, and that it is the duty of the jury to accept that law from the judge as the judge gives it to them. However, once we have observed this tradition by standing a few moments as we have now, I suggest that you be seated. And I now do suggest that you be seated.

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As I understand it, in ancient times the judge and the jury stood throughout the period when the judge addressed the jury. But that's not necessary, of course, because we are only observing a tradition. But it is an important tradition because it reminds the jury of the judge's supremacy in the field of the law. But, of course, the judge also stands when he addresses the jury formally. And he does that out of traditional recognition of the fact that the jury is supreme in the field of deciding the facts of the case. The judge has no power to decide the facts; he has no duty to decide the facts. The facts are only for the jury and only for the jury to decide. And I remind myself of that as I should do by rising and remaining standing when I address you formally.

By the facts, of course, I mean what happened? What took place? Who was there? Who said this? Who said that? What time of day or night it was, what was done? Those are what we call the facts, and the jury decides the facts. If I say anything here which may sound to you as though I have some feeling that the facts are one way or another, I know that you will put that out of your mind and disregard it completely. I have no right to make any such suggestions. I have no intention of doing so, but I realize,

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knowing human frailty as I do that I might easily unfortunately use some choice of language that would

sound as though I agree with the State's version of some particular fact, or that I agree with the defendant's version of some particular fact. You will disregard such an unfortunate slip of the tongue, of course. I will have to mention the fact sometimes to say, "if you find the facts to be so and so, you will apply this law." But I'm only doing that to make it clear under what conditions you would apply various rules of law, if you find the facts to be — to justify and require the — require the application of that law. As I told the members of this jury who served on previous cases, the jury mustn't be afraid of accepting the law from the judge. In the first place, it's your duty to accept it from me. But in the second place, although I do not claim to be infallible, I am fortunately able to tell you that if I do make an error, as to the law, a higher court on appeal can correct that error. So the jury may safely, and must, of course, accept the law from me as I give it to the jury.

In the first place this defendant is charged with one of our most serious offenses, of course. He is charged with murder. But this defendant, like all defendants

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charged with any case, with any criminal — in any criminal case, I should have said, charged with any criminal offense is presumed to be innocent. We have a rule of law in this country that a person charged with a criminal offense is presumed to be innocent. And the presumption of innocence remains with him throughout the trial, until the jury in the jury room during your deliberations determines that the State has removed that presumption, if the State has removed it, by satisfying you of his guilt beyond a reasonable doubt. In other words, there is a distinction between our procedure and that followed in some of the European countries where, as I understand, if a person is charged with a crime, the burden is upon him to prove his innocence. We do it just the opposite way here, and we are proud of it. Here a person charged with a crime is presumed to be innocent, and it is the duty of the State to prove his guilt. We sometimes say that the person charged with an offense comes into court wearing the presumption of his innocence about his shoulders like a cloak. That is a quaint phrase, but I think it describes the situation. And it is for you to say whether the presumption has been removed by evidence which has been presented. And whether the State has proven his guilt beyond a reasonable doubt.

[505]

As to some aspects of the case, the burden of going forward with particular evidence may be upon the defendant. And I will have occasion a little later on when I describe the elements of the crimes of murder and manslaughter to speak of a situation where the law presumes that a killing under certain conditions is with malice aforethought. I will speak about that and the defendant's duty in such a situation. But bear in mind as to both the State — as to the whole case, the State has the burden of proving the defendant's guilt beyond a reasonable doubt.

Those of you who have heard me charge before on the meaning of the term reasonable doubt have already probably decided that the words themselves are a very good definition of their meaning. I must, however, explain to you more fully exactly what the law means when it describes the State's burden of proof as proof beyond a reasonable doubt. The words are in common usage. There isn't any mystery or any magic in their use in this connection. But a further explanation I think will give you — will make it more clear to you how you apply the rule, how you test it against the facts as you find them. When we say that the State must prove a defendant's guilt beyond a reasonable doubt we mean that the State must prove more than a

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mere possible doubt — mere possibility of the defendant's guilt, and more than a mere probability of his guilt. On the other hand, proof beyond a reasonable doubt doesn't mean that the State must prove a defendant's guilt beyond every doubt, beyond a foolish doubt, or beyond an imaginary doubt, or fanciful doubt. A reasonable doubt is a doubt that arises in the minds of reasonable men and women for which a good logical, solid, substantial reason can be given. It is a doubt that would cause a reasonable, conscientious man to pause and hesitate before going forward in matters of serious consequences. One for which you can assign a reason to your conscience when you come out of the jury room. It does not mean that the State must prove a defendant's guilt beyond all mathematical possibility. We know, of course, that such a degree of proof is not possible in human affairs; in matters depending upon human testimony. And, if such a degree of proof was required the task of law enforcement would be an impossible one, of course. And public protection would be impossible. It means just what the words themselves say; proof beyond a reasonable doubt. May I use — may I read to you the language which our Maine Supreme Court has used which I think clearly explains the law's use of these words: "It is a doubt which a reasonable man of sound judg-

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ment, without bias, prejudice, or interest, after calmly, conscientiously and deliberately weighing all the testimony would entertain as to the guilt of the defendant." Now, you ladies and gentlemen are reasonable men and women. You don't have — you are people of sound judgment. That is why you were chosen by the jury commissioners of the county for this particular important responsibility. You don't have any bias, or prejudice, or interest which will affect your judgment here. You are going to weigh all this testimony when you go to your jury room, as the Court said, calmly, conscientiously, and deliberately. And then if you decide that the State has proven the guilt of the defendant beyond a reasonable doubt, you will find him guilty. If you find that the State has not proven him guilty, proven his guilt beyond a reasonable doubt, you will find him not guilty.

I am going to speak of the definition of the terms of manslaughter and murder a little later. But I should at this point remind you that when the issue is submitted to you, you will, as you already appreciate from the attorneys' arguments, have the duty of deciding first whether the State has proved that the defendant is guilty of a homicide. Then, if you find that the State has not proven that, you would find the defendant not guilty. If you find that the State has proven the defendant guilty of a homicide, you will then have to decide whether the State has proven the homicide to be murder or manslaughter. So, these are possible verdicts that you may bring in; you will find that you may bring in. Will be not guilty, guilty of murder, or guilty of manslaughter. I will speak at length on this later, of course. I should add here that it is the duty of the jury, of course, to weigh the evidence and decide what weight should be given to each bit of evidence and to all the evidence in the case. You wouldn't, I know, arbitrarily or lightly disregard a bit of testimony for a capricious reason, but in your own good judgment, in your own good common sense as men and women of experience in the world, you decide what weight each bit of testimony is entitled to receive and what weight all of the testimony is entitled to receive.

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This defendant is being tried upon an indictment which was brought against him by the grand jury of this county. I mention that, because you heard the indictment read by the Clerk, and I must point out to

you that that indictment is not evidence. It is simply the written charge which the State brings against the defendant. You wouldn't be prejudiced against the defendant or conclude that he must be guilty or that he is likely to be guilty because the grand jury saw fit to bring in an indictment against him. Because you and I don't know what impelled the grand jury to return an indictment. We do not know what evidence the grand jury heard. We do know that the grand jury heard only the State's side of the case. The grand jury does not decide whether a person is guilty. The grand jury only decides whether an indictment should be returned against a person or not on the basis of the evidence that the grand jury has heard. The grand jury decides whether the person should be compelled to stand trial. So remember that the indictment is only the written charge. And you will decide the guilt or innocence solely on the basis of the evidence that you have heard here in this court room, apply to it the law that I give you, after examining the exhibits that I'll speak of later. And you may draw, as you know, such reasonable inferences as you see fit from all facts which have been well-proven.

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You ladies and gentlemen are men and women of the world. I gather from the questioning of you that I went through when the jury was being impaneled that you come from many different points, from many different walks of life. Your backgrounds have varied greatly. Your ages vary somewhat. You are a cross section of society. You have a tremendous composite total of human experience. And that total of years of human experience it would be interesting to try to figure out. But if there are 600 — if there are 12 of you going to decide this case, and if you had — if your average was 50, I realize it isn't, but if it was 50 you'd

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have 600 years of total experience, in the light of which you would examine the testimony. So I dare say you have close to 500 years of total experience of human experience represented. Even if it was only 400 years it would be a tremendous total of human experience, in the light of which jurors may examine a case. And in the light of your great human experience you may draw inferences so long as those inferences are drawn from facts which have been proven beyond a reasonable doubt. An inference is a process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence of other facts or stated facts which, of course, have been proven beyond a reasonable doubt. May I give you an example of an inference. Purely for example; I remember once last winter when a large 10-wheeler truck went off the road opposite my house, turned over, lay on its side in the field. When I went away to court Monday morning the truck was still lying on its side there out in the snow. When I returned from my duties Friday night I noticed that a truck was still there. It looked like the

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truck that was there when I left Monday morning. It had — had what appeared to be the same markings; it had — appeared to be the same size; it was in the same position; the tracks in the snow hadn't changed. In such a case a jury would probably say I was safe in drawing the inference that that was the same truck that I had seen lying there Monday morning; that it had been there all week, it hadn't been moved. Of my own knowledge I can't say that I saw it there every day, that it never moved; but because of all the conditions that I have spoken of you would probably say that I would be justified in drawing the inference that the truck had been sitting there all week. On the other hand, if the circumstances were different, if it were a boy's bicycle leaning up against the snow bank, and I saw it there when I left Monday morning; and I saw

another one — I saw one, I should say, in the same spot appearing to be the same when I came back Friday night, you might feel in the light of human experience I wouldn't be justified in drawing the inference that the bicycle remained there all week. Perhaps the boy took it away. Perhaps he brought it back and put it in the same place. That — by that example, I hope it illustrates the fact that in the light of human experience it is for jurors to say whether they can draw in-

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ferences from particular facts. From some facts you feel that you can draw inferences. From other facts you feel from human experience teaches you that you can't draw any inference.

There are several kinds of evidence in this case from which you are asked to find facts. And I will have to speak now of those kinds of evidence. First, we have had here direct evidence. We have had the testimony of the witnesses. We have had the testimony of people who saw things happen, or say they saw things happen; who observed things, heard things, and who have testified to. They were here on the stand, these witnesses. You saw them. You observed them when they were testifying. You noticed the kind of people they were. You noticed their manner of testifying. You could perhaps decide in your own minds and in your own judgment whether they appeared to be fair or unfair; candid or evasive; honest or dishonest; whether they appeared to have been in a position to know and see and hear the things they claimed they heard and saw. You probably can consider their memory as to events; whether it was good or bad; whether, as I say, they were in a position to hear or see the things they testified they saw and heard. Did they appear to be interested or disinterested in the outcome of the case? Now interest is one of the things the jurors may take in mind in evaluating a person's testimony, in

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deciding what weight should be given to a person's testimony. Because you and I as men and women of experience know that some people who have a great interest in the outcome of a case, who would want very much to see a case go one way or the other would even lie in an effort to make a case go the way they think it should. Others would not lie, but they might unconsciously let their testimony be colored or affected a little bit by their interest. Then, you and I know other people, no matter how great their interest in the outcome of a case is, wouldn't lie. They would not let their testimony be colored, or changed, or affected in the least bit by the fact that they hoped that one side or the other would succeed in the case, or that they would like to see one side or the other succeed. But the interest or lack of interest of a person in a case is one of the things jurors may take into consideration in deciding what weight should be given the testimony of the witness.

It isn't a question of how many witnesses testify or how few witnesses. As I've said, mere weight of numbers does not control. It is the quality of the testimony that controls, not the numbers. It is the — it is for the jury in evaluating the testimony to decide what weight you think the testimony is entitled to. As I am speaking of the witnesses who testify, it might be a good

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place for me to mention the fact that the defendant did not take the stand to testify as a witness. I mention that for only one reason; because the law makes it my duty to mention it. I must caution the jury this, in fact: That if a person is charged with a criminal offense our constitution gives him the right to decide whether he wishes to take the stand and testify, or whether he does not wish to take the stand and testify. So whether he chooses to do so, or whether he chooses

not to do so is his right. And I instruct the jury, that the jury, if the defendant as in this case, chose not to take the stand and testify, the jury must not take that as evidence of his guilt. The jury must not in any way be prejudiced against him or against his case, because of the fact that it was his decision not to take the witness stand to testify. Only to caution the jury as to that. Only because it is my duty to caution the jury as to that am I even mentioning the fact that the defendant did not take the stand to testify.

We have had here the testimony of several people who would be classified in the law as expert witnesses. An expert witness is a witness who has had some unusual training or experience in a certain field, a training or experience in that field greater than the experience and understanding and training than you and I

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have had in that field. We, as laymen, cannot equal the understanding, or the training, or the experience of that witness. So the law permits those expert witnesses, those people with particular training in the field — in the field of medicine or many — in many other fields to express opinions which you and I as laymen couldn't express as to the matters within their field of training and experience. Expert witnesses are, however, are human beings. But they are human beings with special training and special experience. And for the jury to analyze and evaluate and give weight, such weight as the jury sees fit to the testimony of the expert witness, as the jury gives weight to the testimony of the other witnesses in the case. But bearing in mind, of course, that the expert witness has had particular training and had particular experience which is greater than that which you and I as laymen have in this field. We have also had in this case a number of exhibits introduced. That is, certain articles have been brought in and marked for identification and admitted in evidence, such as photographs. So, you will have those exhibits with you in your jury room. You may examine those exhibits. And it is for you to say what weight you shall give these exhibits in aiding you in determining the facts of the case, as you decide what weight should be given to the testimony in the case. I

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should caution you again not to allow your emotions to be inflamed in any way by any of the evidence in the case, and especially by the examination of the exhibits. Photographs of a deceased person are not pleasant to look at. Photographs of a human body that has been injured and damaged are always pitiful objects to examine. These photographs were — of the — of the body of the deceased were admitted into evidence not to inflame the jury; not to prejudice the jury; not to make the jury to become emotional and feel anger against a person who is charged with the death of the individual shown in the photographs, but only because the nature and extent of the injuries which you find were done, if you find that they were done to the deceased may be considered by the jury and given such weight as the jury sees fit in helping you decide the nature of the blows struck which caused these injuries; the extent of the blows struck; the nature and extent of whatever violence you find was used upon the deceased. So again, may I remind you, maintain your calm judgment, your logic and your sense of justice. You may view the exhibits for the purpose — for which purposes for which they were introduced, and do not allow your emotions to become in any way inflamed by them.

There was testimony here that the defendant made certain oral statements to one or more of the police

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officers. And there was testimony that under certain circumstances which you will recall he signed a written

statement which the jury will have as an exhibit in the case. It is for you to say in examining this testimony what weight you should give to any statements, oral or written, made by — which you find to be made by the defendant. It is for you to say, in examining the testimony as to the statements, the manner in which they were made. The manner in which you find they were made, the background, the circumstances under which they were made. It is for you to find what was said by the defendant and what meaning should be placed by the jury on whatever words you find the defendant used. The significance of whatever you find was said by the defendant in an oral or written statements is for the jury, of course, to determine.

Here the State's case rests upon two kinds of testimony. Circumstantial evidence and admissions made which the State contends were made by the defendant. And I am going to speak about circumstantial evidence as I have gone on to speak about admissions. May I make it clear then, what I mean. The State does not present in this court room any witness who has taken the stand and testified that he personally saw the defendant kill Claude Hebert. If a witness took the stand

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and gave that testimony that would be direct evidence, of course. You have heard no such witness. That does not mean, of course that the jury must find the defendant not guilty; because there was no person present, there was no person who testified before you that he saw the act done. Because, of course, it is a well-known fact that many crimes are committed in the — when no one but the — I should say many crimes are — of homicides are committed when no one but the victim and the killer are present. And the mouth of the victim, of course, is often sealed by death. So the State presents certain other evidence from which the State contends the jury may conclude that the defendant is guilty. I am going to have to speak of circumstantial evidence at some length now. So, bear in mind that the State seeks to prove the defendant's guilt in two different ways: one by the circumstantial evidence of which I am going to speak; and secondly, by what the State says are admissions made by the defendant. So, in one way or the other or in both ways, the State contends that it has proven guilt of the defendant beyond a reasonable doubt. And it is for you to say whether the State has done so or not.

I guess we are all quite familiar with the meaning of the words — or, of the use of the words 'circumstantial

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evidence'. It is — it means evidence of facts and circumstances standing around the facts in question. Direct evidence, of course, is evidence of one who sees an act take place; who hears it, or sees it, or smells it, or feels it. Circumstantial evidence is evidence not of a person who saw an act take place, but of people who saw other things take place, or of other bits of evidence. Evidence standing around the fact from which the jury may or may not conclude that the principal fact has been proven. May I give you — or, first; may I say; there is no rule of law that says that circumstantial evidence is not as strong as direct evidence; there is no rule of law that says that circumstantial evidence is as strong as direct evidence. In some cases circumstantial evidence might be weaker than direct evidence. In other cases it might be stronger. And in still other cases you might feel it was of equal strength. Let me give you an example of circumstantial evidence. We will say it is winter time and I want to know whether a car has just driven into my driveway and backed out again. It has snowed during the night, and the snow has just stopped falling. And in the morning I look out of the window and I see a man standing out there. And I say, "Did a car just drive in my driveway and back out?" And he says, "No, I've been here for

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an hour and no car has driven in." Now, that would be direct evidence. That would be evidence of a man who has been right there, and who has said the thing did not take place. Or conversely, if he had said, "I did see a car drive in." That would be direct evidence, too. But we will say that I looked out the window and I see the tracks of a car in my driveway, and I know that it has just stopped falling. Snow has just stopped falling. And I look out and I see that there is no snow in the tracks whatsoever. They are clear and sharp. Now, from that direct — from that circumstantial evidence, from those circumstances I probably conclude that a car had been in my driveway. There is snow on the ground. I see the tracks. I know it just stopped snowing. I know that the tracks had been made since it stopped snowing because there is no snow in the tracks. Step to step; from link, to link, to link I would probably conclude that a car had driven in my driveway a short time ago. Now, in that case I would probably believe the circumstances rather than believe the statement of the man who said he was standing there and knows that — Well, in that example that I give you, you would probably conclude that the circumstantial evidence was stronger than the direct evidence. I can

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easily find — pick another set of circumstances in which you would find that you believe the direct evidence rather than the circumstantial evidence. Or you might take an opposite of facts where I asked the man if a car drove in, and he said, "Yes, a car did drive in." And I look at the snow and I see no tracks in the snow. And I probably there would believe the — the — I would not believe the man, I'd believe the tracks in the snow — believe the absence of the tracks in the snow as carrying more weight. So, as I say, it is for a jury to say what weight should be given to all kinds of evidence, including circumstantial evidence. In some cases you may find circumstantial evidence strong and convincing and justifies guilt, even if standing alone. In other cases you might find circumstances — circumstantial evidence alone does not justify guilt. In some cases you may find the guilt justified, find the guilt proven beyond a reasonable doubt by the fact that certain facts proven by circumstantial evidence, and others proven by an admission or confession. In other cases you may find that all the evidence in a case; the circumstantial evidence in the case; the admissions; all the evidence does not justify the finding of guilt. A chain of circumstances, a chain of circumstantial evidence, each link of which is proven beyond a reasonable doubt may properly lead you to conclude that the defendant's guilt has been proven beyond a reasonable doubt. But a chain of circumstances like any other chain is no stronger than its weakest link. And if there is a weak link in the chain of circumstances which raises a reasonable doubt in the minds of the jury, the jury should bring in a verdict of not guilty. Unless, of course, there is other evidence in the case, direct evidence, that satisfies the jury beyond a reasonable doubt. This our court has said. When we seek to determine whether circumstantial evidence is sufficient to warrant conviction in a criminal case its accuracy and soundness must be tested by inquiring whether it excludes every other hypothesis; every other hypothesis than that of guilt. It is not enough that the circumstances are all consistent with the defendant's guilt and raises a strong probability of it. It must also exclude beyond a reasonable doubt the hypothesis of his innocence and be incapable of explanation upon any other reasonable hypothesis than that of guilt. So, it is for you then to consider the evidence and circumstantial evidence in this case, and along with the other evidence, and to decide what weight you should give to each bit, and whether under the rules I have given you the guilt of the defendant has been proven by circumstantial evidence alone, the circumstantial evidence with the admission, or whether it has not been so proved.

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There is one bit of testimony which I will have to refer to while speaking of circumstantial evidence. 'And that is the testimony of Mrs. Farrand, I think the name was. The telephone operator, who says she's a telephone operator of the Bell Company in Lewiston. You will recall she testified that early in the morning she received certain calls which she said — which the State contends were from a certain telephone booth in the Caledonia motel in the Town of Jay. And I am not going into the details of what she said. That is for you to recall. But simply to say, to remind you this: The State contends that the caller on the phone said certain things to her. And the State contends that the person who made that call on the telephone was the defendant. If you find that the defendant was the person, if you find that the State has proved by circumstantial evidence that the defendant was the person who made those telephone calls, then you may consider as evidence what Mrs. Farrand testified that that person told her. If you do not find that the defendant was the one made those telephone calls, then of course, whatever that person said about what he had done or what he'd heard would be hearsay, you would disregard it. The State contends it has proved to you beyond a reasonable doubt that the defendant was the person who made those telephone calls in which the State says it has proved it by a chain of circumstances. The State says that because the calls were made from a certain place, at a certain time, in a certain manner, because Mrs. Farrand called back at a certain time and a voice answered which she said she believed was the defen-

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dant's voice, or whatever her words were, and because the State said the defendant admitted — or, I shouldn't use the word admitted — but the State says the defendant made a statement to the police officers that he had made certain calls, and so on, whatever the chain of circumstances is. But the State says from that evidence you should conclude that the State has proven beyond a reasonable doubt that the defendant was the one who made the telephone calls. And — most of those telephone calls. And, if so, if the State has so proven, then you may consider as evidence whatever you find the defendant's — whatever you find the defendant said to her, to Mrs. Farrand, or said to the other people on the line which Mrs. Farrand said she heard in the course of those telephone calls, and give them such weight as the jury sees fit. Of the defendant's position as to that, you have heard the defendant's counsel speak of it, and I won't go further into that, except to say that that is a part of the case which the defendant — which the State maintains, contends the State has proved by circumstantial evidence. And whether the State has or has not is for you to say and not for me to say.

Then, from all the evidence in the case, after you evaluate it, however — what weight you see fit to give to it, whatever facts as you find them; from the testimony, the exhibits, the direct evidence, the circumstantial evidence, the statements made by the defendant; from drawing such reasonable inferences as you see fit to draw from the facts proven beyond a reasonable doubt, if you feel justified in drawing such inferences; from all of those facts you will decide the grave issue which it is your responsibility to determine.

Mr. Wilbur here is charged with a homicide. Homicide is the unlawful killing of a human being. In Maine we have just two kinds of homicide, murder and manslaughter. We don't have degrees of murder as they do in some states, or degrees of manslaughter. If, in your deliberations, you find the State has not proven homicide of any kind, you would find the defendant not guilty. If you find the State has proven a homicide, then you would decide whether the State has proven that the homicide was murder or manslaughter. The charge of homicide, whether murder or manslaughter, the State must prove several things, each beyond a reasonable doubt. In this case you may, as I have said, if you find the State has proven beyond a reasonable doubt that the defendant committed a homicide, decide whether the homicide was murder or manslaughter. And so I'm going to have to speak at some length as to the distinction between these two offenses.

In the first place, of course, in any homicide the State must prove beyond a reasonable doubt that the alleged victim, in this case Mr. Claude Hebert, is dead. I will not review the evidence as that, of course, as every other element of this case is for the jury to say whether the State has proved beyond a reasonable doubt. Then the State must prove beyond a reasonable doubt that Claude Hebert was killed. That is, the State must eliminate beyond a reasonable doubt that he may have died of natural causes or that he died as a result of suicide. That is part of the State's burden. You've heard the evidence as to that. And I won't comment on the evidence. Again, that element is for you to decide. If you decide that the State has so proven, then you would go on and consider the next element the State must prove. The State must prove beyond a reasonable doubt that the killing occurred in Franklin County. Because, of course, if it occurred in another county, then any trial of any person charged with a killing would have to take place in that other county.

This jury, this court has jurisdiction only if the killing took place in Franklin County. But the State contends that the killing took place in the Town of Jay. And you may take — I instruct you that — to take notice of the fact, that the Court takes judicial notice of the fact that the Town of Jay is in Franklin County. Then the State must prove that — I should say that the State alleges that the death took place on January 30, 1966. The State does not have to prove the actual exact date, of course. But what the State has to do is prove that the incident in question, if you would believe, for example, that everyone's judgment of time was wrong and that the death took place before midnight, and therefore, on the 29th rather than after midnight on the 30th. That would not mean that you would find in the case that the State had failed in its burden of proof, and that you would on the basis of that fact find the defendant not guilty. The State has to prove the incident in question. You may find the date and the hour

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important elements to consider, various elements of the important elements to consider, various times, as bearing on the credibility of the witnesses, and the weight to give to different bits of testimony. But, as I say, the State does not necessarily have to prove that this took place on the 30th. If the State had by error alleged a wrong date it would not be a defense to the defendant. But, as I understand, the State does contend that the defendant was — that the deceased was alive at midnight, and that his death occurred some time after midnight. Facts are for the jury and not for me to decide. But the State must prove that the death took place at the place in the Town of Jay and during the incident in question which the State has alleged. Then the State must prove that the victim, the alleged victim Claude Hebert was killed by the defendant. And you have heard the testimony as to that. And finally the State must prove that the killing was

an intentional killing as distinguished from an accidental death. That is, if the deceased was killed as a result of falling downstairs accidentally, for example, the respondent would not be guilty, because the State must prove it was an intentional killing. How do we know what an intentional killing — whether it was an

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intentional killing or not? Well, we can't open the skull of the deceased, of course, or the purpose — for the purpose of reading anything recorded in his brain of what happened in the sense that testimony recorded on a tape recorder of the reporter. And we can't open the skull of the defendant and examine his brain and read any record there of what he was thinking of at the time. But you and I as individuals are constantly being called upon in our daily lives to evaluate the activity of people and to decide what their intentions were. If we know what they did; if we know what their actions were; if we know what the circumstances were; we constantly draw inferences as to what their intentions were from the facts we have had. And so in court, a jury may draw inferences as to what a person's intentions were, if a jury feels that it is justified in doing so from the surrounding facts. I don't mean that a defendant charged with a homicide must necessarily have intended to kill the victim to be guilty of the homicide. But in distinguishing intentional acts from acts of negligence, the jury must decide that the defendant intended to do an act calculated either — I should say; that the jury must find either that the defendant intended death, or that he intended an act which was calculated and should have been understood

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by the person of reason to be one likely to do great bodily harm and that death resulted.

Now, I am going to speak specifically of certain acts, and whether the jury may conclude that those acts prove or indicate murder or manslaughter a little later. And I am going to leave for now my suggestion — my language concerning what the jury finding of what the defendant intended. I will be back to that later.

Finally, the State must prove that the killing was an unlawful killing. I don't need to speak much to you about that, except to remind you, of course, knowing that you are thinking of all aspects of this case, that not all killings are unlawful killings. A soldier may lawfully kill in battle. A policeman may, under some conditions, lawfully kill if necessary to apprehend and subdue a prisoner. A person may lawfully kill in some conditions in self-defense. It is for a jury to say from all the facts whether a killing, if there was one, was a lawful killing. I probably should have added when I spoke considering a person's intentions, deciding whether a killing was an accidental killing or not, that our Court has said, "That the intention to take a person's life may be inferred from circumstances which show an unwillingness to respect human life." You may infer an intention to take life from acts of violence

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which should be expected to do great bodily harm and show a disregard of consequences. And, therefore the person is justly answerable for all the harm he does, although it is not proved that he specifically desired death. This instruction, of course, you will consider in the light of the language I'm going on to use when I consider the weight that the jury will give to heat of passion and sudden provocation in its relation to the crime of manslaughter.

I am about here to give definitions of the crimes of murder and manslaughter, and I think this would be a good place to take a short recess to give the reporter a rest. And in 10 minutes if you will return I will continue with my instructions. Don't start, as I have

said, as I have yet — don't start to examine any of the evidence yet and to apply any of the law I have given to the evidence yet, of course. Wait until you have heard my whole charge. Keep your minds open still. And in 10 minutes we will return and continue with the instructions.

The Court will be at ease.

(RECESS.)

THE COURT (continuing):

The record must show the presence of the defendant and counsel, the State's counsel, and the jury is seated in the box.

When I was speaking of the various kinds of evi-

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dence before you, and I said that the State bases its charge against the defendant as proof — or, may I put that a better way. The State contends that it has proved the guilt of the defendant in two manners; one by circumstantial evidence, and the other by admissions and by — or, I should say; by circumstantial evidence and admissions. I, of course, did not mean to exclude the exhibits of photographs, the physical exhibits in the case. But you may consider those exhibits and give them such weight as you see fit in bearing on the question. Give them such weight as you see fit with the other evidence in the case. That is; by testimony, by exhibits, by the admissions. Has the State proven the guilt of the defendant beyond a reasonable doubt, or has the State not done so?

The defendant here argues that he is not guilty of anything, but that if he is guilty of any homicide at all, it is not murder but only the lesser offense of manslaughter. So thus, it is necessary for you to listen very carefully, ladies and gentlemen, while I describe the difference between murder and manslaughter.

Our statutes define murder as follows, quote: "Whoever unlawfully kills a human being with malice aforethought either express or implied is guilty of murder."

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"Whoever kills a human being with malice aforethought either express or implied is guilty of murder."

The crime of manslaughter is defined as follows: "Whoever unlawfully kills a human being in the heat of passion on sudden provocation without express or implied malice aforethought is guilty of manslaughter." Thus, you see that for a person to be guilty of murder the killing must have been done with malice aforethought, and that the malice aforethought must have been either express or implied. It is manslaughter, if there is an unlawful killing, without either express or implied malice aforethought. If the killing was done in the heat of passion and on sudden provocation.

The words 'malice aforethought' are most important, because malice aforethought is an essential and indispensable element of the crime of murder. And without malice there could be no murder. So I will have to define the term malice for you. Malice, as we use it in this sense, in its legal sense is somewhat different from the common ordinary use of the term malice. Malice at law is not limited to hatred, ill will or malevolence toward the individual slandered. Malice includes that general malignancy and disregard for human life which proceeds from a heart void of social duty and fatally bent on mischief. That's very ancient language,

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but it still is quite expressive. Malice includes that general malignancy and disregard of human life which proceeds from a heart void of social duty and fatally bent on mischief. A wrongful act, in modern language, a wrongful act known to be such and intentionally done without just cause or excuse constitutes malice at law.

It's not necessary for there to be malice that a person specifically hated a person who was killed. Malice, as I have said, includes a wrongful act known to be such and intentionally done without just cause or excuse. An act can be malicious although the person doing it did not at all hate the person who was killed. For example, and purely to illustrate, one of the meanings of the word malice as used in this statute, and not implying you should find anything like this present in this case; but, we'll suppose you had a situation where the father of a small child so loved this child that he couldn't bear to have the child face the cruelties and realities of the world, and so killed the child, because he loved the child so much that he thought the child would be better off in heaven. That's an extreme example but one that I'm giving you because I think it can be clearly understood. He loved, he didn't hate the child, he loved the child. But in the eyes of the law

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he acted maliciously. Because it was a wrongful act, and he knew he didn't have any legal right to do it. The father, in the example, I mean. And he did it intentionally. And although he thought he had a good reason for it, it, it wasn't a just excuse in the eyes of the law. That is what we mean by malice; the intentional doing of a wrongful act which is known to be such and which is done without just cause or excuse. What do we mean when we use the term malice aforethought? It means that there must be at least a momentary consideration before the killing. And a premeditated design to kill. Remember, for there to be murder there must be malice aforethought. But that malice aforethought may be either express or implied. Now, I'm explaining to you what express malice aforethought means. In a moment I'll tell you what implied malice aforethought means. Express malice aforethought means that there must be at least a momentary consideration before the killing, and a premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be long enough to be sufficient for some reflection, and some consideration upon the matter, for the choice to kill or not to kill to be made, and for the formation for a definite purpose to kill. And when the time is sufficient for this it matters not, our Court has said, how brief it is. Then we say that malice aforethought has existed, express malice aforethought. The human mind, our Court has said, acts with a celerity which it is sometimes impossible to measure. And whether a deliberate and premeditated design to kill was formed must be determined by the jury from all the circumstances in the case. So, if you are to find the defendant guilty of murder the State must have proved it was done with either express malice aforethought or with implied malice aforethought.

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I will now take a few moments to speak to you of what we mean when we refer to implied malice aforethought. Remember, that express malice aforethought is present when one with a sedate and deliberate mind and formed design kills another, which formed design is evidenced from external circumstances which make clear the inward intention. Such as, lying in wait; antecedent menaces; former grudges; and concerted schemes to do some bodily harm. That's when express malice aforethought exists. That definition is one which was used by our court more than 100 years ago. It is very old in law, and the language is old, and quaint, but I think the meaning is clear. I am still speaking of express malice aforethought to contrast it with implied malice aforethought. Express malice aforethought is present, for example, when one plots, for example, to poison his enemy; when one lies in ambush to murder him. These actions clearly indicate

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that express malice aforethought is present. Here — I think I have defined what we mean when we say express malice aforethought. When I say — used the example of when one lies in ambush to murder his enemy, I don't mean that the express malice aforethought — that the killer must have laid in wait or that a long period of time must have elapsed. Because, as I've just described it to you, that the — there must have been long enough time for some reflection and some consideration on the matter for the choice to kill or not to kill to be made, and for the formation of a definite purpose to kill. When the time is sufficient for this, as our court has said, it matters not how brief the time is. Now, that's what express malice aforethought is. And, of course, the law recognizes that there may be unlawful killing where express malice aforethought can not in any way be proved. Where there is no way for the State to prove that there was or was not express malice aforethought, because of various reasons including the fact that the victim may have been the only witness, and the victim is dead. So, the law establishes the rule, of course, for the protection of society, that malice aforethought may, in some cases, be implied from an unlawful killing. So, if you find that there was an unlawful killing here of Claude Hebert by the defendant, then you would ask yourselves whether you can, under the circumstances imply malice aforethought.

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The courts of our State have established this rule: That malice aforethought is implied by law from any deliberate cruel act committed by one person against another suddenly or without a considerable provocation. To make it more clear and to be more accurate, in the State of Maine all unlawful killings, all homicides are as a general rule presumed to be malicious. Malice aforethought is presumed to be present in all homicides until the contrary appears from circumstances of alleviation to be made out by the defendant, or arising out of the evidence produced in the case. Now, I must make it clear to you, of course, when you are considering whether there have been alleviating circumstances which destroy the presumption that the act was with malice aforethought. Bear in mind that that can come from any testimony presented in the case.

I am going on to speak about the defendant's burden of going forward with the proof with the evidence, I should say, when there is a presumption that there was a killing with malice aforethought. So, here, if you

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find that there was an unlawful killing of the victim by the defendant, then malice aforethought is implied unless it has been proven to you that the act was done upon sudden provocation in the heat of passion without malice aforethought. If the defendant seeks to demonstrate to you that his act was not one done with malice aforethought, that doesn't mean that he has to do it with evidence coming from witnesses called to the stand by himself, it doesn't mean that he needs to take the stand as a witness to prove that the act was not done by malice aforethought. But if from all the testimony introduced in this case, whether it comes from evidence produced by the State or evidence introduced through the defendant, you are satisfied by a fair preponderance of the evidence, that the act was not done with malice aforethought, that it was done by — upon sudden — in the heat of passion upon sudden provocation, as I will define that, then, of course, then you would find the — that the defendant is guilty of manslaughter and not murder. Our court has put it this way; in all cases, and I am quoting: "In all cases where the unlawful killing is proved beyond a reasonable doubt, and where there is nothing in the circumstances of the case to explain, qualify or palliate the action, the law presumes it to have been done with

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malice aforethought. And if the accused, that is the defendant, would reduce the crime below the degree of murder, the burden is upon him to rebut the inference which the law raises from the act of killing, by evidence in defense." It is again, I must say, that he must call witnesses to the stand in defense. But it means that from all the evidence in the case he must be able to satisfy you by a fair preponderance of the evidence that if he killed, and if he killed unlawfully — or, I should say; although he killed, and although he killed unlawfully, if such is the case, he killed in the heat of passion upon sudden provocation, as I shall explain hereafter. And if such were your findings, then the respondent, the defendant would be guilty of manslaughter. So, when the defendant has the burden of going forward with the evidence his burden is not that of proof beyond a reasonable doubt. His burden is only of proof by a fair preponderance of the evidence. By a fair preponderance of the evidence we mean by by the greater weight of the evidence, by evidence that is more satisfying and more convincing than the evidence that seems to bear out the other side's point of view in the case. So, if the evidence — well, so, if the unlawful killing was proved by the State beyond a reasonable doubt, and if there was nothing in the circumstances to explain anything palliating, then you'd

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find the defendant guilty of murder, because it would be presumed to have been done with malice aforethought. However, if the defendant has satisfied you by a fair preponderance of the evidence introduced, that although he caused the death unlawfully of Claude Hebert, yet the act was done in the heat of passion upon sudden provocation, without malice aforethought, then you would find him guilty of manslaughter and not murder.

In murder trials we often speak of motive or absence of motive. And I must mention that because I think it's a common misconception, that in order to prove a murder the State must prove a motive. Such is not the law, and motive isn't necessary as a part of the State's case, and need not be proven by the State. But lack of a proved motive does not render a defendant innocent of murder when all other essential elements have been proven beyond a reasonable doubt, if they have been proven. Our Court has said frequently in prosecutions for murder that the motive is not an essential element; that not all the acts of men can be explained; and, however, presence of motive or absence of motive is admissible for the purpose of furnishing, if it does furnish evidence tending to prove the guilt or the absence of guilt in — which when considered with all other evidence in the case. So, while the jury may properly consider presence of a motive or absence of a motive, the presence or absence is not an essential part, or an element of a charge of murder, but one of the things, one of the many things which the jury may — may give the presence of it or lack of which, the jury may give consideration to.

I have spoken about the burden of going forward and proving that the crime was done in the heat of passion and on sudden provocation, and not with malice aforethought being upon the defendant. I must make clear, of course, that in the whole case the burden is still upon the State throughout the whole case to prove the guilt of the defendant beyond a reasonable doubt.

Now, I must explain a little more in detail the law in manslaughter. And my duty is nearly at an end. The State contends that the defendant was guilty of murder. The defendant contends he is not guilty of anything. But, that if he is guilty of anything it is manslaughter, rather than murder. You remember the definition I gave you of manslaughter. "Whoever unlawfully kills a human being in the heat of passion on sudden provocation without express or implied malice aforethought is guilty of manslaughter." To reduce murder to manslaughter then, the acts must be in the heat of passion on sudden provocation, and that means in the heat of passion and on sudden provocation. And malice, even implied malice must be absent or even overcome by such heat of passion. Heat of passion means more than anger. It means more than mere irritation. It means that at the time of the act the reason is disturbed or obscured by passion to an extent which might ordinary men of fair, average disposition liable to act irrationally without due deliberation or reflection, and from passion rather than judgment. The state of mind must be such that the suddenly excited passion suspends the exercise of judgment and dominates volition so as to exclude premeditation and a previously formed design, though of short duration. But it is not essential that the transport of passion shall be so over-bearing as to destroy volition of the reasoning faculty to reduce a crime below murder, that is to manslaughter. The killing must be while the killer is in the heat of passion. Heat of passion that is gone and done with or is cooled is not sufficient. It must be active and continuing to avail the defendant. Moreover, heat of passion will not avail unless upon sudden provocation. Sudden means happening without previous notice or with very brief notice; coming unexpectedly, precipitated, or unlooked for. The object of the law is to have passion controlled and subdued and not permit it to become an excuse of palliation of a crime. It is not every provocation, it is not every rage of passion that will reduce a killing from murder to manslaughter. The provocation must be of such a character and so close upon the act of killing, that for a moment a person could be — that for a moment the defendant could be considered as not being the master of his own understanding. If such an interval of time elapsed between the provocation and the act of killing as is reasonably sufficient for reason to resume its sway, the offense is not mitigated to manslaughter. The provocation must be real, it must be reasonable, it must be recent, and the act of killing must be done in a sudden transport of passion to reduce the offense from murder to manslaughter. The provocation must be the direct and controlling cause of the passion. And it must be such as naturally and instantly to produce in the minds of persons ordinarily constituted. The highest degree of exasperation, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection. Our Court has said, and I quote the words of our Court: "Words alone do not constitute sufficient provocation to reduce homicide from murder to manslaughter." But bear in mind that I've said that the provocation must be the direct controlling cause of the passion; and it must be such as naturally and instantly to produce in the minds of persons ordinarily constituted the highest degree of exasperation, rage, sudden resentment or terror rendering the mind incapable of cool reflection.

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Now, I have given you the general definitions of the crimes of murder and manslaughter with some further explanations; quoting largely, using largely the language of our courts, sometimes in quaint formal language, but I'm sure that it is language that the jury can understand and from which you can see clearly the definitions of the two offenses.

Now I am going to become more specific in suggesting how you can or can not apply the rule if, and only if, you find certain facts present. And in doing so I am not suggesting that you should or should not find certain facts present. But here the defense argues that if the defendant struck any blows upon Claude Hebert, any blows he may have struck were not struck with malice aforethought but were struck as a result of homosexual advances made by the deceased. And no other reason appears presented in argument by the defense for the blows, except the fact that the defense contends that a homosexual advance was made by the deceased. Of course, in the first place there isn't any right of a person to punish another person who makes any indecent assault or a homosexual advance upon him by killing that person. There's no right, I mean, to punish that person by killing him or by doing him serious injury. If a homosexual advance is made to me in the — in the nature of an assault, in the nature of a touching of my person, in any indecent manner, then the only right which I have to — is to repel that assault by the use of reasonable force. That means that I can repel an indecent assault upon me. I can defend myself against it. I can ward it off and thwart it, by the use of such force as appears reasonably necessary under the circumstances; such force as the person of ordinary reason and understanding would believe, under those circumstances, would be necessary to repel that assault. The kind of force that I use; the type of force that I use must be that which appears reasonably appropriate and reasonably necessary to repel the assault under the circumstances. The defendant here contends that you should find from the evidence that Claude Hebert tried to unzip the defendant's trousers and put his head down at the defendant's crotch. Now, it is for you and not for me to say whether the evidence proves that such a homosexual assault took place. If you find from — that the evidence does not satisfy you that such a homosexual assault took place, that is, if you find that the defendant has not satisfied you by a fair preponderance of the evidence that such — from all the evidence — that

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such an assault, a homosexual assault took place, then, of course, you would not give any consideration to the defendant's contention that he was justified in his actions because of such a homosexual assault. Or, if you — now, let me stop just a moment to see if I need any more. If you find, on the other hand, that such a homosexual assault took place, then you would consider it in the two respects. First, the question of the right to repel an assault. And, secondly, as bearing on the general rules of manslaughter. If Claude Hebert did such an act as the defense argues that you should find he did, such conduct — I'm not saying or suggesting that he did or did not do such an act because that's for you to say — but, if you find he did such an act, such conduct on the part of Claude Hebert would be an assault; an unpermitted touching of the defendant's body in an objectionable manner. And the defendant would be justified in using such force as would appear to a reasonable man under such circumstances necessary, reasonably necessary to you to use in repelling that asault. Or, if Claude Hebert had reason under the circumstances to believe that such an assault was about to be made upon him and that it was reasonably necessary for him to repel that assault, he would have the right to use such reasonable force —

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MR. SEWALL: (Standing to the Court):

THE COURT: Thank you. I said — when I saw the look on your face I knew I'd used the wrong words. I said to you, "if Claude Hebert had reason to believe such an assault was to be made — —". I mean — may I strike that out, and to say: If the defendant reasonably believed, under all the circumstances, that such an assault upon him was imminent, and that it was necessary to use force to repel that assault, he then would have the right to use such force as would appear reasonably necessary, or would appear reasonably necessary to a reasonable person, under those circumstances, to repel that assault. So, bear in mind that there is no right to punish a person making a homosexual advance. Bear in mind that the force used must be such as appeared reasonably necessary. Bear in mind that the test of reasonableness is that which would appear reasonable to a person of average reason. Bear in mind that the test is — that, of reasonableness is, that what would appear reasonable under the circumstances in the light of which — may I begin again. Bear in mind that the circumstances in the light of which this reasonableness is to be viewed are not the circumstances existing here in this court room, but the circumstances which you find existed there that night, the moment in Room 11. If the defendant used only such force as appeared, as were under these rules reasonably necessary to repel such an assault, then of course, he would not be guilty of anything. Because

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if he used only such force as was reasonably necessary to repel an assault upon him, even though death resulted it would be excusable homicide. For instance, and for example, and purely for example, if a person tried to make an indecent assault upon me, and if I push him away using only reasonable force, and if he falls, and falls downstairs, for example, and hits his head and dies, then I would not be guilty of any homicide. That would be justifiable homicide. If the defendant was attempting to repel an indecent assault, and used more than reasonable force, and death resulted, this rule applies: If it appeared reasonably necessary for the defendant to use force to defend himself against an indecent assault, and if while still defending himself he used more force than was reasonably necessary, and if death resulted the death would be manslaughter. But if it appears reasonably necessary for the defendant to use force to defend himself against an indecent assault, then — and he does so; and then after he knows or reasonably should, under the circumstances, should have known that the need for defense had ended. But if the defendant then goes on

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and continues to inflict injury on that other person, and that other person dies, then the death would be either murder or manslaughter depending upon the definition between the two crimes which I've given you, and which I'm about to go on to give you.

So, you see, in applying — in deciding these issues and applying these rules you will need to determine, if you find that the defendant struck Claude Hebert because Claude Hebert made a homosexual advance, whether the defendant struck Claude Hebert to defend himself against this advance, or whether he struck him in anger and in the heat of passion, or whether neither is the reason for the striking. Bear in mind, as I have said, that if there has been an unlawful killing, that is one not justified in self-defense, then the killing is presumed to be with malice aforethought, and the burden is then upon the defendant, the killer, to satisfy the jury that it was not done with malice aforethought either express or implied, and he must do that, he must do this by a fair preponderance of all the evidence. Manslaughter, you will recall, is the unlawful killing of a human being in the heat of passion on sudden provocation with express or implied malice aforethought. Was the killing done in the heat of passion and upon sudden provocation? You must examine the evidence here to determine whether you are satisfied

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by a fair preponderance of the evidence that it was done with malice aforethought express or implied; or whether it was done without malice aforethought express or implied in the heat of passion upon sudden provocation. And I will give you some further rules which may help you in this problem. A jury may consider

the nature of the violence inflicted upon the victim. The jury may ask themselves whether a weapon was used by the defendant. And you have heard counsels' arguments, comments upon the significance of the testimony which they think bears upon this question one way or another. The State argues the evidence indicates that the defendant was struck with a weapon. And the State argues that the evidence indicates that the weapon was such a weapon as a bottle, and argues you should consider that a bottle was used by the defendant as a weapon in some or all of the blows. And the defendant argues that no such conclusion should become — should be drawn by the jury; and that if the defendant struck the victim that the evidence — that the jury should conclude that he struck him with his fists. Now, if you do determine that a weapon was used and that the weapon was used was one which could reasonably be expected to do serious bodily injury or to cause death upon a person, then the jury may give the use of such weapon such weight as the jury —

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or — the jury may give the use of such weapon in whatever manner the jury finds it was used, if the jury does find it was used, such weight as the jury sees fit in deciding whether the evidence satisfies you that the weapon was not used in such a manner as could be expected to cause death or great bodily harm. The jury may give the use of such weapon, if you find it, such weight as you see fit as bearing on the question as to under, whether under the rules I have given you the killing was done in the heat of passion upon sudden provocation, or whether it was done with malice implied by law. Were the blows struck with fists only? And did death thereby result? If you find they were, then you may properly ask yourselves; what was the nature and severity, if any, of the beating? Was it so severe, violent, or long-continued as to raise a probability that great bodily harm or death would result from such a beating? If not of such nature then the crime would be manslaughter. But if of such a severe, violent, and long-continued nature as I have described it the jury may give the circumstances of the beating; its nature, its kind, its length, if you find it was of more than one blow, the jury may give those circumstances such weight as the jury sees fit in bearing on the question as to whether the blows were struck in the heat of

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passion upon sudden provocation, or whether you imply — whether, with other evidence in the case, may convince the jury that heat of passion on sudden provocation has not been proved, and that they indicate malice aforethought, implied malice aforethought. That is for the jury to give such weight as the jury feels justified in giving to such evidence.

It has been well said by our Court, and I quote: "Hands in themselves —" "Hands are not in themselves dangerous weapons. And where death results unintentionally from the use —" "from their use, the result is not murder but manslaughter. But if the defendant intended to kill, or if from the manner and use of his fists what he did was calculated to produce death or great bodily harm, then the jury would have the right to find the defendant guilty of murder." So, do the number and nature of the blows indicate an intent to take the life or to do great bodily harm? Bearing in mind that a man is held by law to intend the natural consequences of his acts. Or, do they not indicate to you an intent to take life or to do great bodily harm? So, you see, in deciding whether the defendant has satisfied you from all the evidence that the act was committed without the intent to take life or to do such serious bodily harm that an endangering of the life of

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the victim was the natural and probable consequence. You make take into consideration, as I say, the nature

and severity of the attack, the nature of the blows struck, and; of course, the law does not expect heat of passion will continue indefinitely. The object of the law is to have the passion subdued and controlled within a reasonable time. The law expects reason to gain control. How long a time heat of passion may continue is for the jury to determine from all of the circumstances. If in the heat of the passion I strike a person blows, in the heat of passion and upon sudden provocation, and after the heat of passion is cooled or should of cooled I continue to do injury which causes death, then my crime may be murder and not manslaughter. I am not suggesting that such was the case or such was not the case. It is for the jury to say from all the circumstances what the heat, what the provocation was, what heat of passion might reasonably be expected to have resulted, and how long heat of passion might have been expected to continue; as you also take into consideration the kind of violence done and its extent. It is not every provocation which will justify a violence resulting in death. And it is not every kind of violence

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which the sudden provocation will justify. I am going to read the language of one of courts which I think may be helpful in that respect. And I am reading from 159 Maine at Page 332. The Court in this case has quoted another Court with approval in using these words. The Court speaks of sudden provocation in heat of passion reducing a homicide to manslaughter, and it uses these words:

> "Yet, if the provocation, though sudden, be not of that character which would in the mind of a just and reasonable man stir resentment to violence endangering life the killing would be murder."

I will read the whole, I guess I'd better read the whole quotation.

> "The principle that an affray may occur or sudden provocation be given which if acted on in the heat of passion produced thereby might mitigate homicide to manslaughter, yet, if the provocation though sudden be not of that character which would in the mind of a just and reasonable man stir resentment to violence endangering life the killing would be murder."

This applies here, of course, and close quotes. I'm not suggesting, of course, this sudden provocation, this aroused the heat of passion which reduces this offense to murder — from murder to manslaughter, or that it

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did not; because that's entirely a question for the jury to decide. It is for you to say here whether there was provocation of such character which would in the mind of a just and reasonable man stir resentment to such violence as may endanger a life. Or, whether the act, as the Court has said, proceeded from an evil disposition or a mind and heart regardless of social duty and fatally bent on mischief, to use the words of the ancient court I quoted before.

Then, whether the act was done — may I rephrase that: If you find that there was an unlawful killing, then the law presumes that it was done with malice aforethought. It implies malice aforethought. That doesn't mean that all killings are with malice aforethought or all unlawful killings. It means that you would consider it as done with malice aforethought unless from the evidence presented you find you are satisfied by a fair preponderance of the evidence that it was not done in malice aforethought; but that it was done in the heat of passion upon sudden provocation of the kind that I have described as would be justified — as it would justify reducing of the crime from murder to manslaughter.

I am almost through with my instructions. I assume counsel may have something more they would like me to add.

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I must refer to the fact that there was testimony in this case that the defendant had been drinking a quantity of alcoholic liquor on that night. You might find that that — that he was affected by that alcoholic liquor. Whether you do or do not find he was so affected is for you to say, of course. I've simply got to give you the rules which are: That voluntary intoxication is not a defense to a crime, of course. It would not be — if a person voluntarily gets himself intoxicated and thus commits a crime which would be a crime for a — that if a sober man did it — he cannot defend himself and say, "Yes, I committed a crime, but I wouldn't have done it if I hadn't been intoxicated." Voluntary intoxication is not an excuse for a crime. The rule is well-settled in this State that the fact that a defendant was intoxicated would not in itself reduce a homicide from murder to manslaughter. The rule is well-settled that the existence or non-existence of a passion is not affected, is not affected by the presence of intoxication, if such thing was present in a defendant. The rule is well-settled that the effect of a provocation upon a person which would reduce the crime from murder to manslaughter is not affected by the fact that a person

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may have been intoxicated. That is, we — you remember, the rule is, when you decide the reasonableness of a person's actions, to reasonableness of a person's reaction to provocation; it must be the action of a just and reasonable person, the kind of an action which could be reasonably expected from a reasonable person under the circumstances, under all the circumstances that existed. However, you may, if you find that the defendant was under the influence to any degree of intoxicating liquor at the time and did certain things, then you may, in deciding what that defendant did. That is, in drawing inferences from the fact as to what the defendant did or did not do, in determining what he did or what he said, in drawing inferences from his actions, in deciding he meant by what he said, you may, of course, consider that he was affected by the use of intoxicating liquor, if you found he was so affected. That is, in explaining and understanding his conduct from the evidence you may bear in mind the fact that he was affected by the use of the intoxicating liquor, if you find that he was so affected by its use. But, as I have said, it is no defense to a person who has committed an offense, if he has committed it, that he was being affected by the use of intoxicating liquor, and that he did a thing which he would not have done if he had not been under the influence of intoxicating liquor. I am not suggesting that such was or was not the case here, only giving you the rule to apply if you find it was.

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Then, ladies and gentlemen, finally, the decision will soon be one for you to make. I know that you will not be affected by sympathy or emotion or by bias or prejudice. I know that your verdict will be based solely upon the law and upon the evidence, and upon such reasonable inferences as you feel justified in drawing from all the facts which have been well proven. If you find that there was — that it has been proven that the defendant unlawfully killed — if you find that it has not been proven that the defendant unlawfully killed the Claude Hebert, then you will find him not guilty. If you find that it has been proven that he unlawfully killed Claude Hebert, then you would ask yourselves; was — has it been, under the rules that I have given you, was the crime murder, or has it been — have you been satisfied by a fair preponderance of the evidence that the — although he killed, unlawfully killed Claude Hebert, that it was done in the heat of passion under such sudden provo — under such sudden provocation and in the manner as would reduce the crime from murder to manslaughter under the rules I have given you. If you find it has been so proven, or whether you find it is not been so proven is for you to say and not for me. And I hope sincerely that I have not, in trying to explain to you these rules, I haven't used any language which indicates I think the defendant is guilty of murder or guilty of manslaughter or not guilty. That is for you to say, not for me.

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Now, of course, your verdict — your verdict must be a unanimous verdict. That is, all twelve of you must agree. And it must be arrived at by written secret, by written secret ballot. You must decide whether the — first, whether the State has proven the defendant is guilty of homicide or whether he is not guilty. If you find he is guilty of the homicide, that is, that he unlawfully killed Claude Hebert, then you will decide on written secret ballot by a unanimous vote, by a unanimous vote, whether the crime is murder or manslaughter. If you are unable to arrive at a verdict in this case you will — and when you are able to arrive at a verdict in this case you will report it in this manner, Mr. Foreman: Knock at the door, tell the jury officers you are ready to report. The jury will come back in the court room; you will remain standing; and the Clerk will ask you, Mr. Foreman, whether you have arrived at a verdict; and you will answer that you have. And then he will ask you whether — you will answer that you have if such is the case — and then he will ask you if you find the defendant guilty of murder, guilty of manslaughter, or not guilty. And you, Mr. Foreman, will answer orally the correct answer to that question.

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Now, are there any requested instructions of counsel that we should speak about?

(Conference at the bench.)

THE COURT (continuing):

I find myself sometimes, while concentrating on what I am going to say, using the — using reference to the wrong party. And counsel here, and very thoughtfully, noticed that I did and called to my attention. And I should correct it for the record. In speaking of the contention of the State I said — I used the words, and I remember using them: I said, "The State contends that the defendant was struck with a bottle." Of course, I meant to say, "The State contends that the victim was struck with a bottle." And I now correct that so that the record may be proper. And I will correct that oversight. And, of course, what I meant was to say was that the State contends that the defendant struck the victim with a bottle. And, of course, to make sure that I am not in any way stating it unfairly I

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repeat; that the defendant, of course, disputes this contention, and the correctness or incorrectness of the contention is for the jury to decide from all the evidence.

Are there any further requests of, or objections to the charge which counsel would like to note?

MR. SEWALL: No further requests.

— OMITTED IN PRINTING —

(JURY RETIRES TO DELIBERATE, ARRANGEMENTS MADE FOR JURY'S LUNCH, CHARGE TO JURY OFFICERS FOR CARE OF JURY, ORIGINAL TRANSCRIPT PAGES 562-567)

— OMITTED IN PRINTING —

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3:35 P.M.: (Upon receiving a note from the jury requesting additional instructions, the following proceeding took place):

THE COURT: The record may show the presence in the court room of the defendant, his counsel, and the counsel for the State. Will you please bring in the jury.

(The jury is seated in the box.)

THE COURT:

Mr. Foreman; the officer delivered me a note which said that the jury would like to have the Court tell them a little more about the rule of implied malice aforethought. And I will go over some of this again for you. Of course, not knowing exactly what you have in mind, I might not give you all that you want. But I think I know about what I should say at this point on that general rule. And if it turns out at any time that you need further instructions from the Court, of course, don't hesitate to call upon me.

I have told you this morning that murder is the unlawful killing of a human being with malice aforethought either express or implied. And I guess I made it clear to you what express malice aforethought is,

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and how we — what evidence would prove express malice aforethought. And then I went on to say that the law recognizes that there may be unlawful killings where there is no way of knowing or no way of proving that there was express malice aforethought. And the law then feels that public policy requires a rule that — the rule of implied malice aforethought. In our State all unlawful killings of a human being are presumed to be with malice aforethought. That is, malice aforethought is implied in all unlawful killings. And in a case where the defendant is charged with an unlawful killing of a human being, and when the jury is satisfied that the killing was an unlawful killing, then the defendant in such a case has the burden of satisfying the jury by a fair preponderance of the evidence that the killing was not with malice aforethought. He has the burden of satisfying the jury by a fair preponderance of the evidence that the killing was done on sudden provocation in the heat of passion. Then from all the evidence in the case, or I should say, if from all the evidence in this case, you are convinced by a fair preponderance of the evidence, that the killing was done on sudden provocation in the heat of passion, and if you are satisfied by a fair preponderance of the evidence

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that it was not done with malice aforethought, then the crime would be manslaughter and not murder. You see, malice aforethought and heat of passion on sudden provocation are two inconsistent things. If there is the — if the crime is done with — in the heat of passion upon sudden provocation, then there is no malice aforethought. If — and if the — if you have been satisfied from all the evidence in the case by a fair preponderance of that evidence, that this offense was committed in the heat of passion upon sudden provocation, as I have defined those words, then they would not be done with implied malice aforethought, and the offense would be manslaughter. If, however, from all the evidence the defendant has failed to convince you that the offense was committed in the heat of passion upon sudden provocation as I have defined them, then the offense would be murder. It is — if it is an unlawful killing it is murder. It is — it is with implied malice aforethought unless you have been satisfied by a fair preponderance of the evidence otherwise that it was done in the heat of passion upon sudden provocation.

I have spoken about the defendant's duty to prove to you that the — that the — by a fair preponderance in such a situation, that the offense was committed in

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the heat of passion upon sudden provocation. As you know, as I guess I've made it clear, I mean simply by that, that you must be able to — you must be convinced as you examine all the evidence in the case that — whether it was introduced by the State or whether it was presented by the defendant — from all the evidence in the case you must be convinced by a fair preponderance of the evidence that the offense was committed upon sudden provocation in the heat of passion. Or — if you are to find the defendant guilty of manslaughter.

So that is the distinction you see, here, between — in the definition betwen murder and manslaughter. That is what we mean when we say malice aforethought is implied in an unlawful killing.

Now, I don't think — probably at this point I need to go over again my definitions of heat of passion and sudden provocation. Although I will if at any time the jury wants me to do so. You'll remember — perhaps what — I know, I'm quite sure you remember what I've told you as to the test of heat of passion and sudden provocation. And the manner in which the jury may examine the evidence and determine from all the evidence whether it is proved that the offense — proved by a fair preponderance of the evidence that the offense was committed in the heat of passion upon sudden

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provocation. One of the things that I've suggested, of course, — one of the things that has taken up a great deal of the time in this case, in the testimony of the case, is the — is the evidence of the kind of violence done to the deceased; its nature, its extent, and so forth, from which the State contends that you should find it was not done in the heat of passion and upon sudden provocation. The State contends that this evidence indicates some — indicates an intention upon the part of the defendant to do bodily — great bodily harm or death to the deceased. And the defendant argues, of course, to the contrary; that contrary significance should be attached to that — to the evidence of the — the kind of an assault, whatever you find it to be.

I might read to you again the language that our Court has used in a fairly recent case. I guess I have made clear to you, but if you need to know it, know more about it at any time later, I will repeat, I have made it clear to you what — that it is for the jury to say whether the provocation was of such a nature as would arouse in a person of — a reasonable person a reaction of violence. It is for the jury to say the extent of violence to be expected in a reasonable man whose

passions were aroused, if you find that this defendant's passions were aroused by sudden provocation, it is for the jury to say how long one would — should — the law should reasonably expect the heat of passion to continue. May I read this language to you: I am reading from 158 Maine 74:

> "Murder under our law is the unlawful killing of a human being with malice aforethought either express or implied. Malice aforethought does not necessarily mean that there must be a specific intent to kill. But our Court has laid down the rule as follows: In all cases where the unlawful killing is proved, and there is nothing in the circumstances of the case as proved to explain, qualify, or palliate the act, the law presumes it to have been done maliciously. And if the accused would reduce the crime below the degree of murder the burden is upon him to rebut the inference of malice, but which the law raises from the act of killing, by evidence in defense —".

By evidence in defense, we don't mean that the defendant must place evidence on the stand, of course, either from his own lips or the lips of witnesses. We mean from all the evidence in the case you must decide

whether — whether there is anything in the circumstances of the case which has been proved to you which satisfactorily explains, qualifies or palliates the act which convinces you that it was done in the heat of passion under sudden provocation, under the rules I have given you. So that the inference of — that it was done with malice disappears.

Now, here, the defendant has introduced evidence which he contends, in argument — I don't say the defendant has introduced evidence. I should say; the evidence has been introduced in the case which the defendant contends in argument should convince you that he did not do the act maliciously as the law has defined malice. That is, it is for you to say what the evidence is. It is for you to say whether you are satisfied whether it has been proved by a fair preponderance of the evidence that certain things were said or done to him which aroused his passions. I shouldn't say 'said or done'. I should say to you; whether it was proved to you that certain things were done to him. I refer to the alleged indecent assault; if certain things were done to him which so aroused — which were such sudden provocation and which so aroused his passions that he acted as the law has defined, as I defined to you, acted under — in the heat of passion. This case goes

on to say — no, I don't think I need to quote any more from that case. I would like to quote to you the case, from the case, the language which I read this morning. Remember, and I'm quoting from 159 Maine again:

> "The principle that an affray may occur", that means a fight, "or that, or sudden provocation be given which if acted on in the heat of passion produced thereby might mitigate homicide to manslaughter, yet if the provocation, though sudden, be not of that character which would in the mind of a just and reasonable man stir resentment to violence endangering life, the killing would be murder",

applies here. I ought to read that again. Because the language is a little indirect. And I — and I — in my reading I slowed up and perhaps made it confusing.

> "The principle that an affray may occur or sudden provocation be given which, if acted upon in the heat of passion, produced thereby, might mitigate homicide to manslaughter, yet of the character — yet, if the provocation, though sudden, be not of that character which would in the mind of a just and reasonable man stir resentment to violence endangering life, the killing would be murder applies here."

In other words, the Court is pointing out that sudden provocation if acted on in the heat of passion might mitigate homicide to manslaughter. But, however, that if that provocation, although sudden, as the Court says, "be not of that character which would in the mind of a just and reasonable man stir resentment to violence endangering life", then it would not reduce murder to manslaughter.

So, it is for you to say what provocation took place here. Not all provocation will reduce murder to manslaughter. Not all provocation will result in violence during the heat of passion which leads to actions which endangers life or takes life. So the jury has got to decide whether the provocation was of such character which would in the mind of a just and reasonable man stir resentment to violence which endangered life. If you find that the provocation was of such a character which would in the mind of a just and reasonable man stir that person to resentment so that violence would result endangering life, then the killing would be manslaughter. If you find, however, that the provocation was not of such character which would in the mind of a just and reasonable man stir that man to such resentment that he resorted to such violence as you may find took place here, then the — the action, the provocation would not reduce the crime to manslaughter. It would not justify the violence, and the crime would be murder. And so again, consider the evidence as to the provocation. Consider the evidence as to the — the action taken by the defendant in the light of the rules that I've given you. And consider the nature of the — of the violence done; whether it was great; whether it was small; whether it was several blows, or however you find it to be. Give such weight as you see fit to that evidence in indicating, if it does to you, to the — the kind of violence which resulted from the provocation. And then, as I say, apply this rule. Do you feel that the provocation, whatever it was, would, in the mind of a just and reasonable man, stir to such resentment that the violence that followed, if you find that it followed, whatever you find it to have been, was justified.

Now, as I think I said this morning, it is — it is for you to say whether there was here such sudden provocation and such heat of passion that — let me rephrase this language to you. All right; it is simply for you to say, paraphrasing the words of that Court, whether there was provocation of such a character which would in the mind of a just and reasonable man

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stir resentment to such violence as endangers life. Or whether, as our — to use the language of another Court — the act of the defendant proceeded from an evil disposition or a mind and heart regardless of social duty and fatally bent on mischief, to use the word of the Court in the ancient and somewhat quaint words of the Court.

Now, at this point, ladies and gentlemen, I don't know what else I can say that would be of any assistance to you. I hope I have not said anything which made it sound in any way as though I thought that you should be satisfied by a fair preponderance of the evidence that the crime was committed in the heat of passion and on sudden provocation; or that it was not. Bear in mind simply the rule of law that all killings are presumed to be — all unlawful killings are presumed to be done with malice aforethought, implied malice aforethought. And you would consider them to be so done unless you are satisfied by a fair preponderance of the evidence that they resulted in heat of passion under sudden provocation, within the limits of the — of the — the meanings of the term within — in heat of passion upon sudden provocation as I have defined it. If there was — if you are satisfied it was so done within the heat of passion on sudden provocation, as I have defined the terms, then it would not be done with

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malice aforethought. If you decide, if you are not satisfied by a fair preponderance that the defendant committed the act, if you reach that point of deciding whether he committed an unlawful act. If you are not satisfied by a fair preponderance of the evidence that the defendant committed an unlawful killing, but that he did it in the heat of passion under — on sudden

provocation, as I have defined the terms —. I am going to have to start that sentence again, because I've got it confused. It is for you to say, then, whether you have been satisfied by a fair preponderance of the evidence that the rule of heat of passion and sudden provocation applies. If you are satisfied from all the evidence that the act was done in the heat of passion on sudden provocation within the meaning of those terms as I have defined them, then you would find the defendant guilty of manslaughter. If you are not satisfied by a fair preponderance of the evidence that there is evidence which applies — explains, qualifies or palliates the act so that — it was — so that you are convinced that it was done in the heat of passion and on sudden provocation — I'll start that again. If you are not satisfied that the evidence in the case, explained by a fair preponderance, explains, qualifies or palliates the

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act, using the words of the Court, so that the — you are convinced by a fair preponderance of the evidence that it was committed in the heat of passion upon sudden provocation, then you would find the defendant guilty of murder, if you have been convinced that he is guilty.

Is there anything more counsel would like to have me say that can clear up the situation with the jury?

MR. SEWALL: No, Your Honor.

THE COURT: Thank you. It is always hard for a judge to come back and give a jury additional instructions, for fear the judge will emphasize one part of the law unfairly to one side or the other. So I have tried to give you enough of the picture, to repeat enough of the picture so to keep the situation as to both sides' contentions as to the situation still fairly before you. If there is anything more that I can tell you that will help any, I will be glad to. I don't think I need to go further over what I have said before as to what does constitute either passion and what does constitute sudden provocation; and the manner in which the provocation is measured, and so on, because I've covered that so fully. But if you want further evidence on that I will give

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it to you.

Then, the jury may now retire and resume their duties.

(4:15: Jury again retires to further deliberate its verdict.)

(6:30 P.M.: The jury requests by a note further instructions.)

THE COURT: The record will show the presence in court of the defendant, his counsel, the State's attorneys. Bring in the jury.

(The jury is seated in the box.)

THE COURT: Ladies and gentlemen, I have received the message from the Foreman telling me that the jury would like to have further explanation as to the meaning of heat of passion. And I will attempt to give you some further explanation which may be of assistance to you.

First, of course, we have the proposition that murder is the unlawful killing of a human being with malice aforethought either express or implied. And then the rule of law that if there is an unlawful killing it is presumed to be malice aforethought. Malice aforethought is implied. And the crime — every unlawful killing is murder unless there is an explanation which is satisfied — which is satisfying, which serves to palliate or

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qualify the act, and to satisfy the jury by a fair preponderance of the evidence that it was during, in the heat of passion upon sudden provocation. As you — as I would visualize this, I would say if you had a case where there was an unlawful killing and nothing was known at all about the way, the circumstances under which it took place, in all — in most any situation you could conceive of, the jury — it would — if the jury was told nothing whatsoever about the circumstances in which it took place, the — in any situation you could conceive, that I can conceive of, the jury would conclude that it was malice aforethought, implied. That is, there was no explanation, no satisfactory explanation given to reduce it.

Now, in this case, there is evidence in this case from which the defendant contends an explanation is given, which the defendant contends is sufficient to reduce the crime from murder to manslaughter. And the State contends that the explanation, even if accepted by you, and the State contends it should not be accepted by you. But the State says that it is, even if accepted by you, it is not sufficient to reduce the crime from murder to manslaughter. And that, then, is the proposition you are now faced with. Is the — are the facts — or shall I say; is the evidence, whatever you find it to be, of the

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circumstances surrounding this incident, sufficient under the rules to reduce the crime from murder to manslaughter? First, you have to decide what happened. Do you find that an indecent assault took place? If you find — if you are not satisfied by a fair preponderance of the evidence that an indecent assault did take place, then there is no explanation in the case which would serve to reduce the crime from murder to manslaughter. If you find that you are satisfied by a fair preponderance of the evidence that the deceased did certain things which I won't mention again which I've simply referred to as an indecent assault, and that those things were done, then it is for you to say, if you find, as I say, it proved by a fair preponderance of the evidence, those things were done; it is for you to say whether those things are, under all the circumstances, sufficient provocation to arouse such a passion, such a heat of passion as to reduce the crime from murder to manslaughter. The — may I speak now about the meaning of the words 'heat of passion'? And I'll have to speak about sudden provocation, because they are so intertwined in the language. Heat of passion means more than mere anger or irritation. It means that at the time of the act the reason is disturbed or obscured

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by passion to such — to an extent which might render ordinary man of fair, average disposition, liable to act rashly or without due deliberation or reflection and from passion or judgment. The state of mind must be such that the suddenly excited passion suspends the exercise of judgment and dominates volition so as to exclude premeditation and a previously formed design, though of short duration. But it is not essential that the transport of passion itself shall be so over-bearing as to destroy volition of the reasoning faculty. To reduce a crime below murder; that is, to manslaughter, the killing must be while the killer is in the heat of passion. Heat of passion that is gone and done with or is cooled is not sufficient. It must be active and continuing to avail the defendant. Moreover, heat of passion will not avail unless upon sudden provocation. Sudden means happening without previous notice or with very brief notice, coming unexpectedly, precipitately or unlooked for. The object of the law is to have passion controlled and subdued and not permitted to become the excuse or palliation of the crime. It is not every provocation, it is not every rage or passion that will reduce a killing from murder to manslaughter. The provocation must be of such a character and so

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close upon the act of killing that for the moment the defendant could be considered as not the master of his own understanding. If such an interval of time elapsed between the provocation and the act of killing as is reasonably sufficient for reason to resume its sway in the mind of the ordinary — reasonable and ordinary man, in the mind of the reasonable man, then the offense is not mitigated to manslaughter. The provocation must be real, and it must be reasonable, and it must be reasoned. And the act of killing must be done in such — in a sudden transport of passion to reduce an offense from murder to manslaughter.

May I read from a well recognized authority on the subject. And I am reading from Corpus Juris Secondum, Page 903. This authority uses some different language in describing heat of passion. And the additional language may be of assistance to you. "Passion, in order to reduce murder to manslaughter, must be of such a degree as would cause an ordinary man to act on impulse and without reflection." You see, when you come to consider heat of passion you have to measure it against the standard of the ordinary man, the reasonable man. I might be a man who would fly into

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a rage upon the slightest, at the slightest offense. You might be a person who, no matter how or what offense was given to you, or what — in any — or how you might be threatened, wouldn't fly into a passion. The law uses the test, the standard of the ordinary man, the reasonable man. Fit of passion can't be mere irritation, mere anger, mere ill disposition, you see. To justify reduction of crime from murder — from murder to manslaughter, then, it must be on a fit of passion, measured against the reaction of the ordinary man, the reasonable man.

May I read on. "Passion, in order to reduce murder to manslaughter, must be of such a degree as would cause an ordinary man to act on impulse and without reflection. Stated otherwise, the passion must be irresistible, or almost uncontrollable, or such as to render the person beyond the power of self-control or for the time being deaf to the voice of reason, or such as temporarily to suspend or overthrow the reason or judgment by its violence, or naturally to destroy the sway of reason and render the mind of an ordinary person incapable of cool reflection, or it must produce what, according to human experience, may be called an uncontrollable impulse to do violence." To use those words again, the phrase: "It must be such as would, according to human experience, would produce in the ordinary man, in the reasonable man an uncontrollable impulse to do violence. The defendant, the accused must have been aroused to the highest degree of exasperation. The heat of passion must be such as to exclude premeditation and previously formed design." "The passion," and I am leaving out some which is not appropriate. "The passion need not be such as to dethrone reason." That is, a person doesn't have to be insane to be considered in such a heat of passion. "The passion need not be such as to dethrone reason, or temporarily dethrone reason, or be so overpowering as to destroy volition or the reasoning faculties, or so overpowering as for the time to shut out knowledge and destroy volition, or to render the person accused incapable of deliberation, or to be —", excuse me, "or to be uncontrollable." You will recall the language used previously. "It must be such as to produce in the ordinary person, in the reasonable person —. I must adjust this apparent discrepancy in the language I have used in these references, quoting you what the various courts have said. I will strike out the last language where I said that it didn't need to be such as is uncontrollable. I think the correct language is the — which the Court — which I used first: "It must produce what, according to human experience, may be called an uncontrollable impulse to do violence." It does not need to reach the point, this authority says, for there to have been a "whirl-wind of passion" of "transport of passion." All this language, of course, is additional language which I hope perhaps will make clear to you the meaning of the words. Let me think a moment more.

The test is, of course, the effect upon the ordinary man, the reasonable man.

Now, I must go back to the question of provocation. Because, of course, to reduce it from murder to manslaughter it must have been in the fit, in the heat of passion upon sudden provocation. And, of course, as I have said, it isn't every provocation that would reduce a crime from murder to manslaughter. Mere words alone, no matter how offensive, do not reduce the crime, do not justify violence which would reduce the crime from murder to manslaughter. It must be such provocation as the law would consider adequate to arouse violence, and would arouse heat of passion in the person, of the ordinary person, the reasonable person. I will read the language. In 26 American Jurisprudence, on Page 171. "Considerable difficulty is involved in the determination of what constitutes adequate or reasonable provocation for the homicidal act. It does not matter how violent the slayer's passion may have been, it will not relieve him of the implication of murder unless it was engendered by a provocation which the law recognizes as being reasonable and adequate. If the provocation was not sufficient, the crime is murder. To generalize, it may be said that adequate provocation for the requisite degree of mental disturbance may consist in anything that the natural tendency of which is to produce passion in ordinary men, and which the jury is satisfied would produce it in the case before them, and that it does not consist in such a provocation as must, by the laws of the human mind, produce such an effect with the certainty that — that physical effects follow from physical causes. On the other hand, the provocation must not, in every case, be held sufficient or reasonable because such a state of excitement has followed from it, for then, by habitual and long-continued indulgence of evil passions and on account of that very wickedness of heart which in itself constitutes an aggravation both in morals and in law, a bad man might acquire a claim to mitigation which would not be available to better men. It is generally agreed that in the determination of whether provocation is sufficient or reasonable, ordinary human nature, or the average of men, recognized as men of fair average mind and disposition, should be taken as the standard." Then, perhaps to wind up in a very brief summary then, it is for you to decide what — whether you find it proved by the fair preponderance of the evidence that there was an incident, a sudden provocation, as the defense contends. And if you find that there was, you test the passion. You find what passion was aroused. You test the passion against the reaction to be expected from the ordinary man, from the reasonable man. From the — from ordinary human nature, from the average of men recognized as men of fair average mind and disposition. Was the — was such provocation as you find existed, was there such provocation as you find existed, which would arouse such violence as you may find took place, in the ordinary man, in the reasonable man, under the circumstances that you find existed in Room 11 in the Caledonia on this night in question? If such provocation would be expected to arouse such passion in the ordinary man, the the reasonable man, then would you expect the thing — in that reasonable, that ordinary reasonable person, would he be controlled and affected, and to what degree and to what length of time would you expect him to be controlled by the passion?

Do counsel have any other requests they would like the Court to give, or any objections to be noted?

Then, I don't think at this moment of anything else that I can give you that will be of assistance. And I can only suggest to the jury, return to commence your deliberations. If you find that you are not close to a verdict, we don't want the jury to punish themselves physically, of course. You have been in there a long time working. You have been a long time without food. If you feel it advisable, simply knock at the door and let the jury officer know it, and we will either take you out to eat or bring lunch in to you whenever you request it. Thank you.

(7:15 P.M., the jury again retires to further deliberate.)

(7:45 P.M. the jury officer reports that the jury has reached its verdict.)

STATE OF MAINE

FRANKLIN, SS.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. 425

STATE OF MAINE
Appellee

v.

STILLMAN E. WILBUR, JR.
Appellant

DECISION ON APPEAL, JUNE 8, 1971.

Date Opinion Filed
June 8, 1971

Reporter of Decisions
Docket No. 693
Law Docket No 425

STATE OF MAINE

V.

STILLMAN E. WILBUR, JR.

WEBBER, J.

Defendant appeals from his conviction of the crime of murder. We will deal with the points of appeal in the order in which they are presented for our consideration.

> "1. The Court erred in denying the Defendant-Appellant's motion for a new trial."

On the basis of circumstantial evidence and the admissions and confession of the defendant, the jury could properly have concluded that on January 30, 1966, one Claude Hebert was beaten to death by the defendant in Hebert's motel room; that the defendant employed the use both of his fists and a blunt instrument to inflict bodily injuries of such severity that Hebert died within a few minutes. The theory of the defense was that the homicide occurred while the defendant was swayed by the heat of passion suddenly provoked by an indecent overture on the part of Hebert. The jury in declining to reduce the crime from murder to manslaughter may either have disbelieved the evidence tending to support the claim of sudden provocation or have concluded that the nature, extent and severity of the beating administered were inconsistent with any claim that all of the unlawful acts of the defendant occurred while he was still in the throes of such an ungovernable passion as might affect the conduct of a reasonable man. On this posture of the evidence there was no occasion for the trial court to grant the motion for new trial.

> "2. That the record shows that the Defendant failed to waive his constitutional right to have the admissibility of certain evidence against him determined in the absence of the jury. The transcript at pages 391-395 shows that the Defendant failed to give an 'audible answer' to the court's rather detailed statement and question as to his waiving his constitutional rights. It further shows that when the court asked the defendant 'You mean, you would like to have this testimony given without the court first ruling on it in the absence of the jury?' the record does not indicate that he either understood the question or made an affirmative answer. Counsel for the defendant states 'I believe he does.' (understand). And the Court Stenographer said 'I thought I heard him say, 'Yes.' Permitting the testimony to be presented without a record clearly showing that the defendant understood and waived his constitutional right, however unintentional, was obvious error.'

The record discloses that before either any inculpatory admissions or the written confession of the defendant were admitted in evidence, the Justice below in the absence of the jury engaged in an extensive colloquy with both the defendant and his counsel, the manifest purpose of which was to ascertain that the defendant was fully aware of his right to have the voluntariness of these admissions and confession preliminarily determined by the Court. It became apparent during the colloquy that defendant and his counsel

had made a considered decision not to object to the State's evidence but in fact to urge its admission without challenge to voluntariness. As the case subsequently developed the relationship of this decision to defense strategy became evident. The defendant was thereby enabled to get before the jury his basic theory that the crime had been committed in the heat of passion upon sudden provocation without the necessity of his becoming a witness at trial in his own behalf and thereby submitting to cross-examination. In short, the instant case presents a situation in which a dimension is added which goes beyond the mere question as to whether or not there was an intelligent and understanding waiver by defendant of the right to independent determination of voluntariness by the trial court. Here the trial court was faced with an affirmative request made on behalf of the defendant that the evidence be admitted in order that he might have the advantage of certain exculpatory aspects thereof. We hold that the Justice below discharged his full duty by giving an accurate and comprehensive explanation of the right to a preliminary hearing on the issue of voluntariness in the absence of the jury. We further hold that the defendant cannot now be heard to complain because his request that the evidence be admitted was honored. In fact, the arbitrary exclusion of State's evidence which was material and relevant as bearing on the possible reduction of the crime from murder to manslaughter and which defendant desired to have in the case would have constituted reversible trial error. Conversely, there was no error and no constitutional deprivation in admitting the evidence under the circumstances of this case.

> "3. The Defendant-Appellant was not fully informed of his right to counsel as required by the Sixth Amendment of the U. S. Constitution, nor did he waive his right, prior to questioning by Officers Vigue, Lander and Carrier, and it was

> obvious error to admit in evidence their testimony as to statements made by the Defendant."

The issue sought to be raised goes to the voluntariness of the admissions and confession, the admission of which into evidence is discussed above. No further elaboration of this point is required. For reasons stated the defendant elected not to challenge the method by which the proffered evidence was procured.

> "4. Testimony of conclusions as to both the presence of blood and violence, inflamatory in nature, and unnecessary to the presentation of the State's case was so great as to create a climate in which the jury could not render a fair and impartial verdict.[1]

The evidence discloses that the victim died as the result of a physical beating in the course of which prolonged and inordinate force was applied. In the absence of any eye-witness, the State was required to depend upon circumstantial evidence tending to prove the method by which the crime was committed and to negative the defendant's contention that his unlawful acts were performed in the heat of passion. The evidence given by the medical examiner, investigating police officers and others who made observations at the scene with respect to visible wounds on the body of the victim and the location and extent of blood stains and spatters in the room was properly received as bearing on the nature and extent of the fatal assault. We note that but one objection was made with respect to such testimony, which objection was sustained. There is no abuse of discretion and certainly no constitutional deprivation in permitting a jury, without objection, to hear from a number of witnesses a description of the telltale signs of a bloody and atrocious homicide, merely because such testimony may be to some extent cumulative. See *State v. Turmel* (1952) 148 Me. 1, 88 A.2d 367.

> "5. The court erred in not declaring of its own motion a mistrial upon the highly prejudicial statement of Officer Jordan that the bottles which the State was trying to suggest were murder weapons had on them 'minute areas of what appeared to be blood.' Ordering the answer stricken and telling the jury to disregard it did not remove the highly prejudicial nature of the statement. Transcript at page 134."

No motion for mistrial was made and there was clearly no occasion for the trial court to order a mistrial *sua sponte*. The defendant received more than he was entitled to when the answer was ordered stricken and the jury instructed to disregard it. There was no legal requirement which would prevent an experienced police officer with special training in fingerprint identification and other investigative techniques from testifying that he observed on an article found in proximity to the victim's body "minute areas of what appeared to be blood." Because of common familiarity with the appearance of stains caused by blood, even ordinary and less experienced witnesses are permitted in appropriate circumstances to testify that certain stains on clothing or other articles look like or resemble blood stains. See discussion in Underhill's Criminal Evidence, 5th Ed., Vol. 3, Sec. 656, Page 1588; 23 C.J.S. 452, Sec. 876; *Wimis v. State* (1960) 216 Ga. 350, 116 S.E.2d 547; *State v. Willis* (1969) 4 N.C. App. 641, 167 S.E.2d 518.

> "6. That the court erred in admitting State's Exhibit No. 37."

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[1] We have omitted restating the balance of the 4th point of appeal which merely states at length examples from the testimony of the kind of evidence complained of.

This exhibit was a "light blue shirt with blood stains on it" which was found by defendant's landlady about 3½ months after the homicide concealed in a closet which had been used by defendant during his occupancy of his rented room. She identified the shirt as looking like one of the shirts she had seen the defendant wearing. She was able to state positively that the shirt did not belong to anyone in her family. The only tenant of the room who had occupancy after that of the defendant disclaimed ownership of the shirt and any knowledge with respect to it. A pathologist identified the blood stains as "Group A human blood," the same blood type as that of the stains found on the clothing of the deceased. When the exhibit was offered in evidence, objection was made on the ground that discovery of the evidence was remote in time and the exhibit was "not connected up sufficiently to be relevant in evidence." The foundation was properly laid to make the exhibit properly admissible as a piece of circumstantial evidence. Its weight was thereafter for the jury.

"7 (a) That the court erred in charging 'I am fortunately able to tell you that if I do make an error as to law, a higher court on appeal can correct that error.' "[2]

No objection was taken to this instruction and no issue is properly presented on appeal. M.R. Crim.P., Rule 30(b). Lest it be asserted that the alleged error is highly prejudicial and well calculated to result in manifest injustice, we add that the quoted statement was accurate and was properly employed in connection with the Court's admonition that the jury must accept the law as given by the Court. See *Brine v. State*, (Me., 1970) 264 A.2d 530.

"7 (b) That the charge to the jury in relation to the testimony of Irene Farrand left it for the jury to determine what was hearsay and what was not."

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[2] We omit as unnecessary to this opinion the preamble or preliminary statement which introduces the points of appeal set forth in the several sub-paragraphs under Point #7.

This point of appeal misinterprets the action of the Justice below. He submitted to the jury a preliminary question of fact as to whether or not a person placing calls with the witness, a telephone operator, was or was not the defendant. An affirmative finding by the jury was amply supported by evidence. Moreover, the alleged error is not properly assigned under Rule 30(b).

"7 (c) That the reference by the court to the defendant as 'the killer' when stating 'Bearing in mind, as I have said, that there has been an unlawful killing, that is one not justified in self defense, then the killing is presumed to be with malice aforethought, and the burden is then upon the defendant, the killer, to satisfy the jury that it was not done with malice aforethought either express or implied.' "

We treat the point as though it alleged error. Here again there was no compliance with Rule 30(b). We review the instruction only because there might be thought to be constitutional implications. The single sentence quoted in the point of appeal cannot fairly be read out of context. The jury had already been thoroughly instructed as to the elements of unlawful homicide, murder and manslaughter and the burden of proof placed upon the State. The quoted instruction was predicated by the Court upon the assumption that the jury *had first been satisfied* that the State had proved a voluntary and intentional killing *beyond a reasonable doubt*. The Court had then reached the point of discussing the reduction of murder to manslaughter and the burden of proof with respect thereto.

The quoted portion of the instruction omits the final words of the sentence which added, "and he must do that, he must do this by a fair preponderance of all the evidence."

We take judicial notice of the fact that historically a charge substantially in this form has been frequently given in the trial of murder cases but has not heretofore been challenged. The issue being now and for the first time squarely raised, we take the occasion to examine the development of Maine law and the nature and effect of the presumption of malice which arises once the State has proved beyond a reasonable doubt that the defendant committed a voluntary and intentional homicide, not justifiable or excusable, and the remaining issue is whether or not the homicide was committed upon sudden provocation and in the heat of passion so as to reduce it from murder to manslaughter.[3]

In 1854 capital punishment and degrees of murder had not yet been abolished in this state. In *State v. Conley* (1854) 39 Me. 78, 87, 88 the Court, although not required in review of a conviction of murder in the second degree to deal with the procedural effect of the presumption of malice on the burden of proof, used language which evidenced the acceptance of the concept that there is but one basic crime, felonious homicide, of which degrees are recognized and established. Tenney, J., writing for a unanimous Court, used these significant expressions:

> "By the common law, felonious homicide is the killing of any human being without

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[3] In *State v. Millett* (1971) 273 A.2d (Me.) 504 we clarified the procedural requirements where the defense of self-defense is tendered. Because this defense goes to the *basic issue of guilt or innocence of an unlawful homicide,* we limited the burden imposed upon the defendant to that of coming forward with evidence of such character and quality as would generate the issue.

> justification or excuse. * * * *It is divided* into manslaughter and murder. * * * When a party is charged in an indictment with the crime of murder, the *felony actually committed* is the same, whether it has all the elements of murder in the first or second degree, or whether it is wanting in the criterion of murder, and is therefore manslaughter only. *The two lower degrees of felonious homicide* are embraced in the charge of the higher offense, and a conviction of either of the three, or an acquittal under the charge properly made, is a bar to any other indictment *for the same acts.*" (Emphasis ours)[4]

Some of this language was again quoted and *Conley* was cited with evident approval in *Thompson, Petr.* (1945) 141 Me. 250, 255, 42 A.2d 900, 901 and *State v. Park* (1963) 159 Me. 328, 331, 193 A.2d 1, 3. In *Park* the evidence was barren of any proof of sudden provocation.

As early as 1857 this Court declared in *State v. Knight,* 43 Me. 11, 137 that, with the unlawful killing proved beyond a reasonable doubt, 'if the accused would reduce the crime below the degree of murder, the burden is upon him to rebut the inference of malice, which the law raises from the act of killing, by evidence in defense." This "burden" was imposed in *State v. Turmel*, supra, and in *State v. Duguay* (1962) 158 Me. 61, 75, 178 A.2d 129. It has always been understood as requiring proof by a fair preponderance of all of the evidence, that is, that the evidence supportive of reductive factors (sudden provocation and heat of passion) be believed by the factfinder and be of such nature and quality as to make it more probable than not that these factors were operative. In *Brine v. State*, supra at page 534, after again reexamining the instruction and noting its even earlier origin, we said, "We are not persuaded that this which has been the rule in Maine since 1934 should be abandoned." We are still of that view.

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[4] In the earlier case of *State v. Neal* (1854) 37 Me. 468, the charge was assault with intent to murder, no homicide occurring. Since the gravamen of the offense is the *specific intent* accompanying the assault, it was held that the intent alleged and no other must be proved. There was no evidence of *express malice* and, in the absence of homicide, the State was not aided by any presumption of implied malice. Accordingly, a verdict of guilty of assault with intent to murder was set aside. The Court, however, recognized the existence of the presumption of malice implied from intentional homicide, whenever such is shown, and the procedural consequences requiring the defendant to demonstrate "circumstances of alleviation, to be made out by the prisoner" upon the whole evidence.

We find nothing in our older cases which suggests a contrary result. In *State v. Verrill* (1867) 54 Me. 408, the defendant was convicted of murder in the first degree, then carrying the death sentence, upon an indictment charging homicide with malice aforethought. It was contended that the indictment would not support the verdict. It was held that (a) it was not necessary to charge the means by which the homicide was effected, or (b) that it was committed with *express* malice aforethought. The Court recognized that first and second degree murder were not separate crimes but merely degrees of felonious homicide. The Court had no occasion to consider the status of manslaughter or the burden of reduction problem which arises in the instant case. Nothing in *State v. Sprague* (1938) 135 Me. 470, 475, 199 A. 705 tends to negate the existence of the presumption or its procedural effect. Here the charge was murder and the State was required to prove malice either by direct proof of express malice or by use of the presumption or both. It was there held that statements made by the respondent were admissible as part of the State's attempted proof of express malice. In *State v. Wardwell* (1962) 158 Me. 307, 324, 183 A.2d 896 we again affirmed the rule and imposed

the "burden" on the defendant to "rebut" the presumption of malice, although we had no occasion to comment on the quantum of required proof.

In *State v. McCarthy*, (Me., 1969) 256 A.2d 660, 662 we were not called upon to consider the effect of an instruction imposing a burden of persuasion upon the defendant since no such instruction was given. We recognized the concept of "reduction" from one degree of homicide to another as being well established in our law. We do not read *McCarthy* as dispositive of the issue directly presented in the instant case.

The presumption rests upon the foundation of sound public policy. It reflects the public interest in the administration of justice and recognizes the practical impossibility in a vast number of cases of meeting a mere suggestion of sudden provocation and heat of passion by negating proof beyond a reasonable doubt. *State v. Davis* (1940) 6 Wash.2d 696, 108 P.2d 641, 648. It stems from and accords with the sacredness of the right to life and the awful responsibility of one who has been proven beyond a reasonable doubt to have unlawfully and intentionally taken the life of another. We are satisfied that such a policy presumption, bearing as it does not on the guilt or innocence of felonious homicide but only upon the degree of and possible punishment for such homicide, should be accorded such procedural force as is required to make it truly effective, that is, to cast the burden of persuasion upon the defendant to prove sudden provocation and heat of passion by the fair preponderance of all of the evidence.

We face squarely the fact that the majority rule is otherwise and that in many jurisdictions the defendant is required to do no more than generate the issue leaving the State, if it can, to negate the reductive factors by proof beyond a reasonable doubt. We are not persuaded to this view which tends to emasculate the presumption and defeat the very purpose for which sound public policy has raised it. "Does it not, and must it not necessarily still stand, though we may have some doubts of its truth? That which exists is not destroyed simply because it may be enveloped in a thin cloud." *State v. Lawrence* (1870) 57 Me. 574, 584. (Burden of proving defense of insanity).

As recently as 1969 the North Carolina Court reaffirmed its position, maintained for over one hundred years, that where under stated conditions the presumption of malice is raised, the burden of proof shifts to the defendant to reduce murder to manslaughter. The quantum of proof required is "to the satisfaction of the jury." This proof requirement may equal or exceed the requirement of proof by the fair preponderance of the evidence and to that extent is more onerous than that which we impose. *State v. Freeman* (1969) 275 N.C. 662, 170 S.E.2d 461. See also *Gardner v. State* (1960) 216 Ga. 146, 114 S.E.2d 852.

We have not overlooked the implications which might be thought to flow from *In Re Winship* (1970) 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, a case involving proof of juvenile delinquency, in which the Court stated, "(W)e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." As already noted, no burden is imposed upon defendant until the State has first convinced the jury beyond a reasonable doubt that defendant is guilty of a voluntary and intentional homicide. We emphasize that the issue at this point is no longer guilt or innocence of felonious homicide but rather the degree of the homicide.

This case was tried in 1966. At that time the prevailing law found expression in *Leland v. Oregon* (1952) 343 U.S. 790, 75 S.Ct. 1002, never overruled, in which the Supreme Court declined to disturb an Oregon requirement that the defendant in a criminal case assume the burden of proving his mental incapacity to commit the crime. We see no occasion to anticipate either that *Winship* will be so extended as to reach the procedural requirements of *Conley* and *Knight* as now interpreted or that, even if so extended, it will be applied retrospectively.[5] Accordingly, we can discover no error in the charge in the instant case.

> "7 (d) That by reason of the unreasonable delay in sentencing the Defendant the Superior Court lost jurisdiction of the person of the respondent."

The jury rendered its verdict on June 4, 1966. On June 8, 1966, the Court advised defendant of his right to appeal and in open court an appeal was immediately filed. The defendant being indigent, the Court then appointed counsel to represent defendant on the appeal. The Court then afforded counsel an opportunity to bring any other matters to the Court's attention. Nothing further being presented, the Court ordered that defendant be held without bail pending the final determination of his appeal.

On July 5, 1966, the Court convened a special session for the purpose of sentencing the defendant. The record shows that an informative colloquy occurred, the pertinent portions of which we quote as follows:

> "THE COURT: This special term of session of this Court was called, as counsel know and as I think Mr. Wilbur knows, for the reason that I have learned that I was in error in not imposing sentence upon Mr. Wilbur before his appeal. I was unaware, I am sorry to say, of the fact that the last legislature repealed the statute which required sentencing

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[5] Even though the instant case is before us on direct appeal, the question of retrospectivity remains open in view of the language and reasoning of *Williams v. United States*, (1971) 401 U.S. 646, 91 S.Ct. 1148; *Mackey v. United States*, (1971) 401 U.S. 667, 91 S.Ct. 1160; and *Hill v. California*, (1971) 401 U.S. 797, 91 S.Ct. 1106.

upon convictions of murder to be deferred until the appeal had been decided in the Law Court. A rule which was stated by our Law Court in State v. Chase. I believe it is now my duty, in spite of the fact that notice of appeal has been filed, to impose sentence at this time. And I will now ask, Mr. Ryan, if the State has any comment to make or anything to say concerning sentence?

"COUNTY ATTORNEY: No, Your Honor, other than to suggest that the State does make the motion now that sentence be imposed.

"THE COURT: Do counsel for the defense have anything they would wish to say concerning sentence or why sentence should not be imposed, or regarding the situation?

"MR. SEWALL: May it please the Court, it is the position of the defendant that sentence should, in fact, have been imposed at the last term, and that since the May Term finally adjourned, I believe it was on June 15, 1966, this respondent has been in custody wrongfully. And it is the purpose of the defendant and his counsel to test the legality of his confinement to this time by appropriate processes. And we would further state; we don't believe that this special term of court called for today does have jurisdiction to sentence.

"THE COURT: May I ask you then, for the record, as I think I should, Mr. Sewall, if you were — if you yourself, or if Mr. Rowe to your knowledge was aware of the fact that the legislature had repealed the statute I referred to which requires sentence in murder cases to be deferred if there is appeal; if you

were aware of that at the time your appeal was entered and the term of court was adjourned?

"MR. SEWALL: Yes, Your Honor, the defendant was aware of that. In fact, the defendant was advised by me on the last day when he appeared before the Court that sentence would be imposed at that time. And it came as a surprise to both of us when sentence was not imposed.

"THE COURT: And I think it fair, then, isn't it, that the record should show that you did not move for sentence?

"MR. SEWALL: That is true.

"THE COURT: Nor in any way inform the the Court that it was the Court's duty to impose sentence at that time.

"MR. SEWALL: That is correct, Your Honor. It was my feeling and Brother Counsel's feeling that it not only did not require that, but required the contrary.

"THE COURT: And the defendant himself apparently personally was aware of that."

15 M.R.S.A., Sec. 1701, before repeal, had provided that a sentence to imprisonment for life must be deferred until after final adjudication of a pending appeal. This statute was repealed by P. L. 1965, Ch. 356, Sec. 54 effective December 1, 1965. Thereafter the time for sentence was governed by M.R. Crim.P., Rule 32(a).

> "(a) Sentence. Sentence shall be imposed *without unreasonable delay*, provided however, the court may suspend the execution thereof to a date certain or determinable. * * * (Emphasis supplied)

Glassman, Maine Practice, Comment §32.1 contains the following statement: "Despite the language of the rule, the court has a great deal of discretion concerning the time at which sentence shall be imposed. It is an 'unreasonable delay' which is proscribed. It has been noted that a delay in sentencing 'must partake of the purposeful and oppressive, or even smack of deliberate obstruction on the part of the government before relief will be granted.' (*United States v. Grabina* [1962] 2 Cir., 309 F.2d 783, 786)." The Comment accurately states the applicable law. There was clearly no "unreasonable delay" or abuse of discretion in the instant case. It is obvious that a motion for sentence or a suggestion to the Court by defendant immediately following conviction, if accompanied by information with respect to the recent change in the law, would have been acted upon without any delay whatever. The defendant under these circumstances can scarcely be heard to complain or assert prejudice. There was no loss of jurisdiction of the person of the defendant — indeed, the argument borders on the frivolous.

> "7 (e) That the court erred in appointing a State Trooper as an interpreter in violation of the requirements of Rule 28(b) Maine Criminal Rules."

The point is neither briefed nor argued and finds no support in the record. No testimony was adduced through an interpreter. We treat the point as abandoned.

The defendant filed in the Law Court a motion to amend the Statement of Points on Appeal. The practice of amending a Statement of the Points of Appeal other than in the Superior Court from which the appeal originates is not to be encouraged, and under ordinary circumstances would not be permitted. Nevertheless, bearing in mind the unusual circumstances that have

existed in the prosecution of this appeal and the fact that appeal has already been long delayed, and having regard also to the fact that the State had sufficient notice of the proposed amendment so as to be able to brief the points, we elected to allow the amendment and treat the additional points as properly raised. Upon careful review, however, we find no necessity for dealing with the several points with particularity.

Some complaints are made with respect to the instructions given to the jury, complaints which are additional to those already considered in this opinion. It suffices to say that we have carefully considered the instructions in their entirety and are satisfied that they constitute a careful, thorough and accurate statement of the law applicable to this case. There is a total absence of that plain error tending to create manifest injustice which alone would justify reversal in the absence of compliance with Rule 30(b).

Defendant seeks to assert the inadequacy of the representation of his trial counsel. This issue is not properly raised upon direct appeal. *State v. Pullen*, (Me., 1970) 266 A.2d 222, 231; *State v. Lund*. (Me., 1970) 266 A.2d 869, 872. We note in passing, however, that the transcript of the proceedings make it apparent that the case was well and diligently tried by competent and experienced counsel. Our words in Pullen with only slight alteration seem appropriate here. "In other words, it is not enough that counsel's strategy did not result in a verdict of (guilty of manslaughter)." Upon the evidence such a reduced verdict would seem to be the most favorable result for which the defendant could reasonably have hoped.

We have considered all other points raised or sought to be raised upon this appeal and find them without merit.

The entry will be

Appeal denied.

Weatherbee, J. did not sit.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SOUTHERN DIVISION

Stillman E. Wilbur, Jr. Petitioner v. ALLAN L. ROBBINS, Warden, MAINE STATE PRISON, and STATE OF MAINE Respondents	Civil Action No. Petition For Writ of Habeas Corpus

State of Maine

Knox, ss.

To: The Honorable Edward T. Gignoux, Judge of the District Court, District of Maine.

The verified petition of Stillman E. Wilbur, respectfull shows,

1) that he is imprisoned and restrained of his liberty by Allan L. Robbins, Warden in the Maine State Prison, at Thomaston, Maine, and within the jurisdiction of this court.

2) that the cause or pretense of such restraint and imprisonment, to the best knowledge and belief of the petitioner is a commitment issued under color of the authority of the Franklin County Superior Court, at Farmington, Maine, dated July 5, 1966, entitled criminal docket No. 1301.

3) that said imprisonment and restraint are illegal and their illegality consists in the following among other things to wit:

A. That his conviction for the crime of Murder and sentence as well as his appeal was obtained and imposed in violation of the 5th, 6th and 14th Amendments to the United States Constitution in that he was denied due process and equal protection of the law as guaranteed by the United States Constitution and the 6th Amendment as applied to the States by the 14th Amendment to the United States Constitution.

B. That petitioner's conviction is illegal due to the trial Justice's errors in his charge to the jury in so many matters as to completely prejudice the defendant's case.

1) The trial Justice completely removed the pressure of an erroneous verdict from the jury in regards to the consequences of a mistake by stating to the jury that if he made any error as to law, a higher court on appeal could correct that mistake.

2) The trial Justice erroneously charged the jury that it was up to them to determine what was hearsay evidence and what was not.

3) The trial Justice erroneously charged the jury that the elemental allegation of "Malice Aforethought" was not an essential element of murder.

4) The trial Justice erroneously charged the jury as to "Presumption" that if there was nothing in the circumstances to explain anything palliating, then the jury would find the defendant guilty of murder, because it would be presumed to have been done with malice aforethought, putting the burden of proof on the defendant.

5) That the trial Justice erred in using inflammatory language and prejudicial language in his charge to the jury by referring to the defendant as the "Killer".

6) The court erroneously charged the jury that they could conclude whether a weapon was used or not

when the state did not introduce as evidence any instrument purporting to be the murder weapon.

C) That this conviction and sentence was obtained and imposed in violation of the 6th and 14th Amendments to the United States Constitution and are thus illegal and the illegality consists of the following to wit:

1) That your petitioner was deprived of the effective assistance of counsel because they failed to adequately prepare the case by not conducting proper preliminary investigations.

2) That they permitted your petitioner to be kept under guard in the courtroom during the trial in the presence of the jury by a deputy sheriff who was openly displaying a firearm before the jury, implying that the defendant was a desperate and therefore dangerous criminal.

3) That they failed to object to the state's presentation of four witnesses who testified to the crime before it had been established that an unlawful killing had taken place.

4) That your petitioner's attorneys of record failed to object to witnesses testifying to conclusions such as "Bloodstains".

5) That they failed to object to admissions and confessions of your petitioner knowing that they had been the product of a violation of defendant's constitutional rights.

D) That the Maine Supreme Judicial Court sitting as the Law Court has failed to protect your petitioner's rights as to the equal protection and due process clause of the United States Constitution and has been completely prejudiced and biased to your petitioner's case and direct appeal.

1) That the Maine Supreme Judicial Court failed to give your petitioner the right to a direct appeal until they were ordered to do so by the United States First Circuit Court of Appeals. See *Wilbur v. State of Maine*, 421 F.2d 1327 (1970).

2) That the Maine Supreme Judicial Court would not for over a year process your petitioner's direct appeal even though ordered to do so by the First Circuit Court of Appeals.

3) That the Maine Supreme Judicial Court would not process your petitioner's direct appeal until your petitioner filed in the United States District Court, District of Maine, a Declaratory Judgment asking the District Court to grant the First Circuit's order because another year had passed without any action being taken by the State of Maine on your petitioner's direct appeal.

4) That the Maine Supreme Judicial Court during the postponement of your petitioner's Declaratory Judgment, led the First Circuit Court of Appeals to believe that they were doing extraordinary measures to process your petitioner's direct appeal, but because of the lack of preparation of your petitioner's attorney on the direct appeal, and because of the speeding up of hearing dates it caused petitioner to lose his appeal as being frivolous and inadequate.

5) That the Maine Supreme Judicial Court accepted your petitioner's Amended Points on Appeal and then stated in their opinion of the appeal that the points of the appeal were not submitted right and that they could not be heard. See *State v. Wilbur.* Cited as Me., 278 A.2d 139 *Stillman E. Wilbur v. State of Maine.*

6) That the Maine Supreme Judicial Court granted in open court a motion to be put on record that consisted of an objection to counsel for the appeal, because counsel did not brief your petitioner's Amended points on appeal or use the citations of law sent to

counsel to be used on the Amended points, and consequently the points were dropped by the court because they were no citations or case law to support them.

E. No motion for relief from this conviction and sentence has been made in any court of the United States.

F. Petitioner has exhausted all available state remedies pursuant to 28 U.S.C. 2254 by appealing his conviction to the Supreme Judicial Court of Maine on direct appeal, reported at

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus issue directed to the said Warden Allan L. Robbins, commanding him to deliver the body of the petitioner, together with alleged cause of such illegal restraint and imprisonment, forthwith before this Honorable Court and that counsel be appointed to represent petitioner in this matter.

Dated: *December 10, 1971*

/s/ Stillman E. Wilbur, Jr.

Stillman E. Wilbur

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SOUTHERN DIVISION

STILLMAN E. WILBUR, JR.,)
Petitioner)
v.)
ALLAN L. ROBBINS, Warden,)
Maine State Prison, and)
STATE OF MAINE,)
Respondents)

PETITION FOR WRIT
OF HABEAS CORPUS
CIVIL NO. 13-3

REPLY TO ORDER TO SHOW CAUSE

Now comes the above named Respondent, Allan L. Robbins, and through his attorney, Peter W. Culley, Assistant Attorney General for the State of Maine, and replies to the Order to Show Cause dated January 6, 1972, as follows:

1. That the petitioner, Stillman E. Wilbur, Jr., is restrained by the respondent, Allan L. Robbins, pursuant to a Mittimus issued from the Franklin County Superior Court, Criminal Docket No. 1301 in the case of *State of Maine v. Stillman E. Wilbur, Jr.*, after petitioner was found guilty of the offense of murder by a jury verdict entered on or about June 4, 1966. That following sentencing on July 5, 1966, said Mittimus issued on that date. That said Stillman E. Wilbur, Jr., is presently being restrained pursuant to said Mittimus.

2. That said imprisonment and restraint of the

said Stillman E. Wilbur, Jr. and the deprivation of liberty are not without authority of law.

3. That the petitioner has prosecuted a direct appeal of his conviction to the Maine Supreme Judicial Court, *State of Maine v. Stillman E. Wilbur, Jr.*, 278 A.2d 139. That the issues which petitioner here presents to this Court in paragraphs A and B have been before presented in the State Courts of Maine. A copy of said decision by the Maine Supreme Judicial Court in photocopy form, is annexed hereto and made a part hereof.

4. That the issues raised in paragraphs C and D were not raised in petitioner's direct appeal to the Supreme Judicial Court of the State of Maine. That there is presently available in the State of Maine corrective processes, to wit: Title 15, §5501-5546, Maine Revised Statutes Annotated (Habeas Corpus Relief). That petitioner has not presented those issues raised in paragraphs C and D of his petition for Writ of Habeas Corpus to the State Courts of Maine pursuant to the above mentioned statutory reference. That there are no circumstances which would render such processes ineffective to protect the rights of Stillman E. Wilbur, Jr. so as to allow him to bypass available State remedies.

5. For further matter of defense, respondent intends to present to this Court the same record presented to the Maine Supreme Judicial Court in the reference case from which the decision referred to in paragraph 3 above resulted. In this regard, respondent submits a copy of a Motion Seeking an Order Directing that the Clerk of the Maine Supreme Judicial Court Transmit the Designation of the Contents of the Record, the Statement of Points on Appeal, and a transcript of the trial, to the Clerk of the Federal District Court, District of Maine, Southern Division.

Wherefore, respondent prays that this Honorable

Court dismiss and deny the petition for Writ of Habeas Corpus.

/s/ Peter W. Culley

PETER W. CULLEY
Attorney for Respondent

Dated: January 24, 1972

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SOUTHERN DIVISION

STILLMAN E. WILBUR, JR.,)
Petitioner)
v.)
ALLAN L. ROBBINS, Warden,)
Maine State Prison, and)
STATE OF MAINE,)
Respondents)

REPLY'S TO STATE'S
MOTION FOR DISMISSAL
CIVIL NO. 13-3

TRAVERSE

Stillman E. Wilbur, Jr., Petitioner, for his Traverse of the return to his petition for Writ of Habeas Corpus (which return, dated January 24, 1972, carries the caption of "Reply to Order to Show Cause") alleges:

1. That petitioner admits that he is restrained pursuant to a Mittimus issued from the Franklin County Superior Court, Criminal Docket No. 1301, as alleged in paragraph 1 of the return.

2. That petitioner denies the allegation in paragraph 2 of the return.

3. That petitioner agrees with paragraph 3 of the return.

4. That petitioner *wholly denies* paragraph 4 of the return in that the issues *were indeed raised* in petitioner's direct appeal to the Supreme Judicial Court of the State of Maine. A copy of defendants-appellant's motion to amend statements of points on appeal. The order granting the amendment and a copy of letter from one Gerard S. Williams, Attorney for petitioner's Direct Appeal, informing petitioner of the Chief Justice's acknowledgement and receipt of petitioners motion (motion to be on record in objection to Counsel of the appeal), are annexed hereto and made a part hereof.

A. That petitioner further claims that to bring all the allegations back before the Maine Supreme Judicial Court in a petition of Writ of Habeas Corpus would be nothing more than more denial of his constitutional rights as they were before the Maine Courts on Direct Appeal. Petitioner must conclude that the Attorney for the State is trying stalling tactics and petitioner has already spent 6 years in the Courts with unnecessary and unreasonable delays.

5. That petitioner in answer to paragraph 5 of the return intends to present to this Court petitioner's original statement of points of appeal and its accompanying citations that were sent to the Attorney of Record for the appeal. It is petitioner's belief that the above mentioned papers will bring a clearer understanding to petitioner's Writ of Habeas Corpus now before this Court.

WHEREFORE PETITIONER PRAYS:

That the motion for dismissal of petition be dismissed and denied. Petitioner further prays that this Honorable Court will:

A. Grant his Motion for appointment of Counsel.

B. That Court grant his Writ of Habeas Corpus and order his discharge from custody.

Dated: January 31, 1972, at Thomaston, Maine.

Respectfully submitted
/s/ Stillman E. Wilbur, Jr.

STILLMAN E. WILBUR, JR.
Petitioner Pro Se
Box A
Thomaston, Maine 04861

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SOUTHERN DIVISION

STILLMAN E. WILBUR, JR.,)
Petitioner)
v.)
ALLAN L. ROBBINS, Warden,)
Maine State Prison, and)
STATE OF MAINE,)
Respondents)

PETITION FOR WRIT
OF HABEAS CORPUS
CIVIL NO. 13-3

ORDER

Stillman E. Wilbur, Jr., who is a prisoner in the Maine State Prison at Thomaston, Maine, filed with this Court on December 13, 1971, a petition for writ of habeas corpus pursuant to 28 U.S.C. §2441 *et seq.* His petition is accompanied by a motion for leave to proceed in forma pauperis and includes a request for the appointment of counsel. By order dated January 7, 1972, the Court directed respondents to make return to the petition by January 25, 1972, and permitted petitioner to file a traverse to the return by February 4, 1972. In its order, the Court reserved action upon petitioner's motion to proceed in forma pauperis and request for the appointment of counsel until after the return and traverse were filed. On January 25, 1972, respondents filed their return to the petition and on February 3, 1972, petitioner filed his traverse thereto. Filed with respondents' return was the complete record presented to the Supreme Judicial Court of Maine on petitioner's appeal from his conviction, after jury trial, of the crime of murder at the June 1966 Term of the Franklin County, Maine Superior Court, and the opinion of the Supreme Judicial Court of Maine affirming his conviction. *State v. Wilbur,* 278 A.2d 139 (Me. 1971).

In his present petition petitioner contends that his conviction was obtained in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States by reason of alleged errors in the trial judge's charge to the jury (Paragraph B(1)-(6)); the alleged ineffective assistance of his trial counsel (Paragraph C(1)-(5)); and the alleged prejudice and bias of the Supreme Judicial Court of Maine (Paragraph D(1)-(6)).

After a careful review of the petition, return and traverse, and an independent examination of the entire state court record, this Court is satisfied that only one ground asserted by petitioner raises a sufficiently substantial federal constitutional claim to justify further consideration by this Court. The remaining allegations of the petition are either utterly frivolous, contradicted by the record, or plainly without merit, and, to the extent they were presented to the Maine court, were adequately disposed of by that court in a comprehensive opinion by Mr. Justice Webber. *State v. Wilbur, supra.* The single issue justifying further consideration by this Court is that presented by Paragraph B(4) of the petition, which reads as follows:

> (4) The trial justice erroneously charged the jury as to "Presumption" that if there was nothing in the circumstances to explain anything palliating, then the jury would find the defendant guilty of murder because it would be presumed to have been done with malice aforethought, putting the burden of proof on the defendant.

IT IS THEREFORE ORDERED as follows:

(1) The petition is DISMISSED and the writ DENIED in all respects except for Paragraph B(4);

(2) The motion for leave to proceed in forma pauperis is GRANTED as to Paragraph B(4);

(3) The Court in its discretion having determined that petitioner is financially unable to obtain counsel, and that the interests of justice require that counsel be appointed to represent him, the request for the appointment of counsel is GRANTED as to Paragraph B(4), and Peter J. Rubin, Esquire, of Portland, Maine, a member of the bar of this Court, is appointed under the provisions of the Plan for the Adequate Representation of Defendants pursuant to the Criminal Justice Act of 1964 as amended, to act as counsel for petitioner in this proceeding unless and until relieved by order of this Court, and thereafter unless and until relieved by order of the Court of Appeals.

(4) The Court will receive written and oral arguments on the issue presented by Paragraph B(4) in accordance with a schedule to be agreed upon by the Court and counsel.

Dated at Portland, Maine, this 9th day of March 1972.

/s/ *Edward T. Gignoux*

United States District Judge

(Seal)
A true copy
Attest:
Morris Cox, Clerk
By E. Darity
Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SOUTHERN DIVISION

STILLMAN E. WILBUR, JR.,)
Petitioner)
v.)
ALLAN L. ROBBINS, Warden,) CIVIL NO. 13-3
Maine State Prison, and)
STATE OF MAINE)
Respondents)

OPINION AND ORDER OF THE COURT

GIGNOUX, J.

After a jury trial in the Franklin County, Maine Superior Court, the petitioner, Stillman E. Wilbur, Jr., was convicted of the crime of murder in violation of 17 M.R.S.A. §2651. He was sentenced to life imprisonment in the Maine State Prison and is presently in respondents' custody serving that sentence. On appeal, the Supreme Judicial Court of Maine affirmed his conviction. *State v. Wilbur*, 278 A.2d 139 (Me. 1971). He has now filed in this Court a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2241 *et seq.* In his present petition, petitioner contends that his conviction was obtained in violation of his federal constitutional rights on a number of grounds, only one of which raises a sufficiently substantial federal constitutional claim to justify further consideration by this Court. This is petitioner's contention that he was denied his Fourteenth Amendment right to due process of law by the trial judge's instructing the jury that if it were satisfied the State had proved beyond a reasonable doubt an intentional and unlawful killing, malice aforethought was "presumed" and the defendant would be guilty of murder, rather than manslaughter, unless he established, by a fair preponderance of the evidence, that he had killed in the heat of passion upon sudden provocation.

The single issue presented is whether in thus placing the burden on petitioner to show, even by a preponderance of the evidence, the absence of malice aforethought, the Court denied him due process of law under the rule of *In re Winship*, 397 U.S. 358 (1970). It is conceded that petitioner has exhausted his available state remedies with respect to this question as required by 28 U.S.C. §2254(b), and the case has been submitted on the state court record. For the reasons which follow, the Court is persuaded that *In re Winship* requires that petitioner's conviction be set aside.

At the trial, the State's evidence was that on January 30, 1966, one Claude Hebert was beaten to death by the defendant in Hebert's motel room. In the absence of any eyewitness, the State's case was based upon circumstantial evidence and the defendant's pretrial admissions that he had inflicted such severe injuries upon Hebert with his fists and a blunt instrument that Hebert had died within a few minutes. The defendant did not testify or offer any evidence. The theory of the defense was that, as asserted in the defendant's pretrial admissions, the defendant had killed Hebert in the heat of passion suddenly provoked by an indecent homosexual overture on the part of Hebert and that therefore he had not acted with malice aforethought and was guilty of manslaughter, not murder.

The trial judge instructed the jury at length on the difference between murder and manslaughter. He then informed the jury of the State's burden to prove beyond a reasonable doubt that the defendant killed Hebert and that the killing was intentional and unlawful. He also informed the jury that malice aforethought was an "essential and indispensable" element of the crime of murder. Finally, quoting in part from the standard instruction on murder which has been given in this state for over one hundred years,[1] he charged the jury as follows:

> "In all cases where the unlawful killing is proved beyond a reasonable doubt, and where there is nothing in the circumstances of the case to explain, qualify or palliate the action, the law presumes it to have been done with malice aforethought. And if the accused, that is the defendant, would reduce the crime below the degree of murder, the burden is upon him to rebut the inference which the law raises from the act of killing, by evidence in defense." It is again, I must say, that he must call witnesses to the stand in defense. But it means that from all the evidence in the case he must be able to satisfy you by a fair preponderance of the evidence that . . . although he killed, and although he killed unlawfully, if such is the case, he killed in the heat of passion upon sudden provocation, as I shall explain hereafter. And if such were your findings, then the respondent, the defendant, would be guilty of manslaughter. So, when the defendant has the burden of going forward with the evidence his burden is not that of proof beyond a reasonable doubt. His burden is only of proof by a fair preponderance of the evidence. By a fair preponderance of the evidence, we mean by the greater weight of the evidence, by evidence which is more satisfying and more convincing than the evidence that seems to bear the other side's point of view of the case. So if the evidence — well, so, if the unlawful killing was proved by the State beyond a reasonable doubt, and if there was nothing in the circumstances to explain anything palliating, then you'd find the defendant guilty of murder,

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[1] *See* note 4 *infra*.

> because it would be presumed it would have been done with malice aforethought. However, if the defendant has satisfied you by a fair preponderance of the evidence introduced, that although he caused the death unlawfully of Claude Hebert, yet the act was done in the heat of passion upon sudden provocation, without malice aforethought, then you would find him guilty of manslaughter and not murder."

The trial judge's initial charge and two supplementary charges, given when the jury returned to ask for further instructions, included repeated references to the mandatory nature of the presumption of malice and the burden on the defendant to rebut the presumption in order to "reduce" the homicide from murder to manslaughter.

In *Winship*, the Supreme Court held that proof of a criminal charge beyond a reasonable doubt is constitutionally required. The Court stated:

> Lest there remain any doubt about the constitutional stature of the reasonable — doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Id.* at 364.

The Maine court recognized the implications of *Winship*, but declined to apply it to the case on, it appears, two grounds. First, it saw "no occasion to anticipate" that *Winship* would be applied retrospectively. *State v. Wilbur, supra* at 146. Second, it felt that *Winship* would not be "so extended" as to reach the presumption of malice arising from an intentional and unlawful killing since "no burden is imposed upon defendant until the State has first convinced the jury beyond a reasonable doubt that defendant is guilty of a voluntary and intentional homicide," and the issue at that point "is no longer guilt or innocence of felonious homicide but rather the degree of the homicide." *Idem.*

As to the first ground upon which the Maine court declined to apply *Winship*, the Supreme Court has since eliminated any doubt as to the retrospective application of *Winship*. In *Ivan V. v. City of New York*, 407 U.S. 203 (1972) (decided six days after oral argument in this case), the Court squarely held that *Winship* was to be given complete retroactive effect. As the law now stands, therefore, and as it applies to petitioner, his conviction for murder can be upheld only if "every fact necessary to constitute the crime with which he is charged" was proved beyond a reasonable doubt.[2]

The second ground upon which the Maine court distinguished *Winship* was based upon its conclusion that the crime with which petitioner was charged was "felonious homicide," and that malice aforethought was not an essential ingredient of that crime, but merely determined the degree of the offense. The term "felonious homicide," however, has never appeared in the Maine criminal statutes. Under the Maine statutory scheme an unlawful killing may be either murder or manslaughter. The statutory definition of murder is:

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[2] If the nonretroactivity of *Winship* were the sole basis for the Maine court's decision, this Court would be disposed to require petitioner to return to the Maine courts in order that they might be given an opportunity for reconsideration in the light of the subsequent Supreme Court decision. It is well settled that comity requires such action. *Subilosky v. Massachusetts*, 412 F.2d 691, 693-94 (1st Cir. 1969); *Brown v. New Jersey*, 395 F.2d 917 (3rd Cir. 1968); *Blair v. California*, 340 F.2d 741, 743-44 (9th Cir. 1965); Pennsylvania *ex rel. Raymond v. Rundle* 339 F.2d 598 (3rd Cir. 1964). And this Court has done so on several recent occasions. *See e.g. Gordon v. Robbins*, Civil No. 13-127 (D. Me., Aug. 16, 1972). But since the Maine court has already held that, even if retroactive, *Winship* would not be applicable, it would be only repetitious to require petitioner again to present the issue to the state courts. *Brown v. Allen*, 344 U.S. 443 (1953). *See generally* Note, *Developments in the Law — Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1093-1103 (1970).

> Whoever unlawfully kills a human being *with malice aforethought, either express or implied,* is guilty of murder and shall be punished by imprisonment for life. 17 M.R.S.A. §2651. (emphasis supplied)

The statutory definition of manslaughter, insofar as presently relevant, is:

> Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, *without express or implied malice aforethought* . . . shall be punished by a fine of not more than $1,000 or imprisonment for not more than 20 years . . . 17 M.R.S.A. §2551. (emphasis supplied)

The Maine Statutes thus define two separate and distinct crimes of murder and manslaughter, each with its own elements and sentence. Malice aforethought is made the distinguishing element of the offense of murder, and it is expressly excluded as an element of the offense of manslaughter. For a person to be guilty of murder, malice aforethought, either express or implied, must be found. *State v. Merry*, 136 Me. 243, 247 (1939).[3] It is undeniably an essential element of the crime of murder and as such, under the rule of *In re Winship*, must be proved by the prosecution beyond a reasonable doubt.

The Maine court also sought to justify the presumption of malice as reflecting "the public interest in the administration of justice" and as recognizing "the practical impossibility in a vast number of cases of meeting a mere suggestion of sudden provocation and

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[3] "[I]n murder, malice aforethought must exist, and as any other elemental fact, be established, not beyond all possible doubt, but beyond a reasonable doubt . . ."

heat of passion by negating proof beyond a reasonable doubt." *State v. Wilbur, supra* at 145.[4] But the Supreme Court has made clear the limited circumstances in which a presumption in a criminal case can pass constitutional muster. It has specifically rejected the comparative convenience of producing evidence as sufficient to validate a presumption. *Tot v. United States*, 319 U.S. 463, 467, 469-70 (1943). At a minimum, there must be a "rational connection between the fact proved and the ultimate fact presumed." *Id.* at 467. A criminal presumption is "irrational" or "arbitrary," and therefore unconstitutional, "unless it can at least be said with substantial assurance that the presumed fact is *more likely than not* to flow from the proved fact on which it is made to depend." *Leary v.*

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[4] It is unquestionably true that the "presumption of malice" from an intentional killing dates back to at least the sixteenth century. See Moreland, Law of Homicide 20-23 (1952). As the Maine court observed, it has existed in the law of Maine, apparently without challenge, for well over one hundred years. *See, e.g., State v. Knight*, 43 Me. 11, 35, 137 (1857); *Brine v. State*, 264 A.2d 530, 534 (Me. 1970). But see *State v. McCarthy* 256 A.2d 660, 663 (Me. 1969). Today, however, most jurisdictions regard the "presumption of malice" as really an "inference" rather than a "presumption," so that the jury may, but need not, conclude that malice is present in the absence of evidence to the contrary. *See, e.g., Belton v. United States*, 382 F.2d 150, 154 (D.C. Cir. 1967); *People v. Morrin*, 187 N.W.2d 434 (Mich. 1971); *Commonwealth v. O'Neal*, 271 A.2d 497 (Pa. 1970); LaFave & Scott, Criminal Law 539 (1972). Furthermore, as the Maine court conceded, *State v. Wilbur, supra* at 146, in most jurisdictions the defendant need do no more than merely raise the issue of lack of malice in order to create a reasonable doubt in the jury's mind. LaFave & Scott, *supra* at 539-40. Indeed, the Maine court has recognized the distinction between a mandatory presumption and a permissive inference in closely analogous cases. *State v. Collamore*, 287 A.2d 123, 124-45 (Me. 1972); *State v. Poulin*, 277 A.2d 493, 498 (Me. 1971). The difficulty in the present case is that the presumption of malice upon which the trial judge charged the jury, and which was approved by the Maine court, was a mandatory presumption which required the jury to find malice unless the defendant proved the absence of malice by a preponderance of the evidence.

United States, 395 U.S. 6, 36 (1969) (emphasis supplied). In addition, the Supreme Court has strongly implied, even prior to *Winship*, that a criminal presumption must "also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." *Id.* at 36, n.64; *Turner v. United States*, 396 U.S. 398, 416 (1970). But whether the proper test is the "more likely than not" standard or that of "reasonable doubt", it is not satisfied by the presumption of malice in the present case. It surely cannot be said with substantial assurance, and it certainly cannot be said beyond a reasonable doubt, that malice accompanies intentional killings in more cases than not. *Cf. State v. Cuevas*, 488 P.2d 322 (Hawaii 1971).

There remains for consideration the question of whether the trial judge's instruction constituted "harmless error" under the doctrine of *Chapman v. California*, 386 U.S. 18 (1967). In *Chapman*, the Supreme Court held that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 22. But *Chapman* also laid down the rule that "before a constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. This Court has carefully reviewed the entire charge. Although the charge included the usual instruction regarding the burden upon the state to prove the guilt of the defendant beyond a reasonable doubt, the trial judge repeatedly and explicitly instructed the jury on the mandatory nature of the presumption of malice and the burden on the defendant to rebut that presumption by a preponderance of the evidence. On this record, this Court is unable to say that the error was harmless beyond a reasonable doubt.

For the reasons stated, this Court holds that petitioner's conviction was obtained in violation of his Fourteenth Amendment right to due process of law. Accordingly, the judgment of conviction and sentence imposed upon petitioner by the Franklin County Superior Court is vacated, and the matter is remanded to that court to afford the State an opportunity to grant petitioner a new trial. In the event of the failure of the State to grant petitioner such relief within 60 days from the date hereof, the writ will be sustained and petitioner ordered discharged from custody.

The Clerk will enter an appropriate order in accordance with the foregoing, which order will also provide that this Court will retain jurisdiction of the present petition for the entry of such further orders as may be necessary or appropriate.[5]

Dated at Portland, Maine this 29th day of September, 1972.

S/ Edward T. Gignoux

United States District Judge

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[5] Petitioner has been ably represented throughout these proceedings by court-appointed counsel, Peter J. Rubin, Esquire, of the firm of Bernstein, Shur, Sawyer, and Nelson, Portland, Maine. Mr. Rubin's service has been in the highest tradition of the bar. His conscientious efforts on behalf of petitioner have greatly assisted the Court.

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 72-1348

STILLMAN E. WILBUR, JR.,
PETITIONER, APPELLEE,

v.

GARRELL S. MULLANEY et al.,
RESPONDENTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Before COFFIN, *Chief Judge,*
ALDRICH and MCENTEE, *Circuit Judges.*

Vernon I. Arey, Assistant Attorney General, with whom *Fernand LaRochelle,* Assistant Attorney General, was on brief, for appellants.

Peter J. Rubin, by appointment of the Court, with whom *Bernstein, Shur, Sawyer & Nelson* was on brief, for appellee.

February 14, 1973

ALDRICH, *Senior Judge.* Petitioner Wilbur was convicted in the Maine Superior Court of the murder of one Hebert as a result of a beating. Wilbur did not take the stand. The principal evidence against him was his statement to the police, the admissibility of

which is not presently controverted, that he did the act. This concession was coupled with an assertion that he had not intended to kill, and that the whole episode was the spontaneous result of anger provoked by a homosexual overture by Hebert. As to this the court placed the burden upon the petitioner. It charged the jury,

> " 'In all cases where the unlawful killing is proved beyond a reasonable doubt, and where there is nothing in the circumstances of the case to explain, qualify or palliate the action, the law presumes it to have been done with malice aforethought. And if the accused, that is the defendant, would reduce the crime below the degree of murder, the burden is upon him to rebut the inference which the law raises from the act of killing, by evidence in defense.' It is again, [sic, not?] I must say, that he must call witneses to the stand in defense. But it means that from all the evidence in the case he must be able to satisfy you by a fair preponderance of the evidence that . . . although he killed, and although he killed unlawfully, if such is the case, he killed in the heat of passion upon sudden provocation, as I shall explain hereafter. And if such were your findings, then the respondent, the defendant, would be . . . guilty of manslaughter and not murder."

It is common ground that this charge was in accord with what has been the law of Maine for a hundred years. Wilbur did not take exception to the charge at trial. On appeal, however, the Supreme Judicial Court, noting possible constitutional implications, considered and rejected Wilbur's later voiced objection. *State* v. *Wilbur*, Me., 1971, 278 A.2d 139.

While the appeal was pending the Supreme Court decided *In re Winship*, 1970, 397 U.S. 358. Although the issue there was the limited one whether a state might prove juvenile charges by a preponderance of the evidence rather than by proof beyond a reasonable doubt, the Court concluded with ringing and unmistakable language.

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364.

In affirming the correctness of the charge which imposed a burden on the defendant, the Maine court concluded with a reference to *Winship*, but after observing that it had "not overlooked" the implications of that case, dismissed it on two grounds. The court did not believe the Supreme Court would apply it retroactively (an erroneous prophecy, *Ivan V.* v. *City of New York*, 1972, 407 U.S. 203), or that it would be "so extended as to reach the *procedural* requirements of *Conley* and *Knight*[1] *as now interpreted.*" (Emphasis suppl.). 278 A.2d at 146. After this ruling, which manifestly exhausted his state remedies, Wilbur sought a writ of habeas corpus in the district court. Here he met with success. *Wilbur* v. *Robbins*, D. Maine, 1972, 349 F. Supp. 149. The state appeals.

The rationale of the Maine court, expressed at some length in *Wilbur*, but with perhaps more specificity in *State* v. *Rollins*, Me. 1972, 295 A.2d 914,[2] is that in Maine there is only one crime — "felonious homicide" — which is the intentional and unlawful killing of a

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[1] *State* v. *Conley*, 1854, 39 Me. 78; *State* v. *Knight*, 1857, 43 Me. 11.

[2] *Rollins* was decided a month after the district court's opinion ordering Wilbur's retrial. There is no direct reference, however, to that opinion, or, indeed, to *Winship*.

human being. When these elements are proved beyond a reasonable doubt, the court states, criminality is established and malice aforethought "functions as a legal formula by which Maine law differentiates ultimate punishment classifications (designated under the labels, 'murder' and 'manslaughter')." 295 A.2d 917. Before us Wilbur characterizes this analysis as an attempt to make "an end run" around *Winship*. There is nothing wrong with an end run. The question must be whether in doing so the court went offside.

Certainly within broad limits a state court must be the one to interpret its own laws. *McMichaels* v. *Hancock*, 1 Cir., 1970, 428 F.2d 1222. We must hold, however, that a totally insupportable construction which leads to an invasion of constitutional due process is a federal matter.

Although in *Rollins* the court stated that "a single underlying criminal entity, 'felonious homicide' [*i.e.*, intentional and unlawful killing], has been continuously reflected in the law of Maine," 295 A.2d at 918, it conceded that "differences in the wording . . . from time to time" had to be taken into account. With deference, we are compelled to conclude that in its review of "wording" the court was unduly selective. To begin with, there is no recognition in *Rollins* of the fact that the legislature has seen fit, and, apparently has always seen fit, to treat murder and manslaughter separately, in separate sections, and in no apparent way as a single crime with varying sentences. In the 1964 Maine Revised Statutes, Chapter 85 is entitled "Manslaughter." The initial section, section 2551, Definition, provides as follows,

> "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, . . . or commits manslaughter as defined by the common law shall be punished

> by a fine of not more than $1,000 or by imprisonment for not more than 20 years . . . ."

Chapter 89 is entitled Murder. Section 2651, Definition, reads,

> "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life."

Instead of discussing the statutes, the court in *Rollins* referred to prior decisions which it said supported its view of a single offense. It indicated, for example, *State* v. *Park*, 1963, 159 Me. 328, 193 A.2d 1, as a case involving "reducing the penalty severity of an intentional killing from 'murder' to 'manslaughter.' " Examination of *Park* is not supportive. The court there used no such language. On the contrary, speaking through Chief Justice Williamson, it referred to "reducing the crime of murder to that of manslaughter." Interestingly enough, that is the precise language used in *Wilbur*, in a portion of the opinion, 278 A.2d at 141, where the court's attention was not directed to the necessity of wording that would take the Maine rule out of the reach of *Winship* implications. We do not think of "reducing the crime" as a paraphrase of "reducing the penalty." Nor did the court in *Park* think in terms of a single offense. After citing the murder and manslaughter statutes, Chief Justice Williamson continued, "*The differences between the two offenses* have been set forth by our court in the often cited cases below." (Emphasis suppl.) The court then cited and discussed *Conley* and *Knight*, n. 1, ante.

We need not ourselves discuss *Conley* and *Knight*. It seems sufficient for present purposes to say that in 1963 the Maine court regarded them as supporting the conclusion that murder and manslaughter were two offenses, and that it was only in 1971, after *In re Winship*, that the court "now interpreted" them (*see* ante) otherwise.

The suddenness of this new interpretation is indicated by our own review of the "wording" of prior Maine decisions. In addition to *Park*, which we must suggest contradicted rather than supported the court, we note three cases which the court did not cite at all. In *State* v. *Merry*, 1939, 136 Me. 243, 8 A.2d 143, the court, rather than speaking of degrees of punishment for a single crime embracing both 'murder' and 'manslaughter' as "label[s] for purposes of penalty identification," stated that, "[i]n this State degrees of murder have been abolished. *The crime* is now defined by statute as the unlawful killing of a human being, with malice aforethought, either express or implied."[3] (Emphasis suppl.) In *State* v. *Ernst*, 1955, 150 Me. 449, 114 A.2d 369, the defendant was convicted of manslaughter after having been charged with murder. In disposing of defendant's objections, not here relevant, the court described manslaughter as a "lesser offense than that concerned in the charge of felony murder." 150 Me. at 464. Finally, the distinction based upon separate offenses figured importantly in *Collins* v. *Robbins*, 1951, 147 Me. 163, where the court spoke of manslaughter as a "lesser included offense." This could not mean they were the same offense. The fact that they were separate offenses, the defendant being a minor, raised the jurisdictional questions the court was concerned with.

In all fairness to the court, it is possible to pick and choose language from some of the cases which it did cite to make an argument in favor of its present position. We regard it, however, as a very weak argument. The court's selected citations do not stand alone. Particularly, they do not stand apart from the statutes. We cannot believe that the legislature, if asked to revise the present laws, and being told that it would be but a "procedural" step (*see Wilbur*, quoted ante), would enact a single statute stating that "all unlawful killings" constitute the crime of murder, and that simply the sentence would vary, depending on whether the defendant satisfied the jury that he had not meant the result. We believe that in the mind of the public murder is thought of as a premeditated killing, *see* post, and that the court's speaking of manslaughter as simply a different "penalty label" would find no more public acceptance than it would, for instance, if it were to say that because in both cases the act of sexual intercourse was unlawful, adultery and fornication were just labels for distinguishing the length of incarceration. By distinguishing one crime from another, the legislature has made the crucial choices and the courts cannot sweep away at their pleasure the incidents that attach to those choices. One such incident is the requirement that the government prove beyond a reasonable doubt that a defendant has violated each element of the legislatively proscribed pattern of behavior.

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[3] In the present case the judge instructed that express malice aforethought would be evidenced by, for example, the defendant's lying in wait for his victim. While the jury could conceivably have convicted on the basis of express malice, it is obvious that it did not do so here, since there was no such evidence and the jury returned twice for instructions regarding implied malice and extenuating circumstances. Even if we could not determine what theory the jury convicted on, we would reverse the conviction, because the mere possibility of conviction based on an unconstitutional presumption requires reversal. *See Leary* v. *United States*, 1969, 395 U.S. 6, 31-32.

Although we must find the Maine court's analysis unacceptable, petitioner can have no valid complaint if there is some other approach by which the burden that the court placed upon him could be justified.[4] The presumption states that once the jury finds an intentional and unlawful killing, malice aforethought is presumed. At argument before us the state contended that the words "malice aforethought" were really only surplusage, included within the terms intentional and unlawful, and that therefore once the latter elements were proved beyond a reasonable doubt, malice aforethought was also proved to that standard. While the term malice aforethought is an amorphous one, and while it may not have any independent meaning in some other jurisdictions, the law of Maine conclusively gives it distinct significance. In *State* v. *Merry*, ante at 247-48, the court stated that malice "includes that general malignancy and disregard of human life which proceed from a heart void of social duty, and fatally bent on mischief." It then went on to state that malice aforethought implied premeditation. *See also State* v. *Turmel*, 1952, 148 Me. 1. Even in petitioner's trial, after instructing the jury that "malice aforethought is an essential and indispensable element of the crime of murder [a]nd without malice there can be no murder" the trial judge gave the *Merry* definition of malice and concluded,

> "That's very ancient language, but it still is quite expressive . . . A wrongful act, in modern language, a wrongful act known to be such and intentionally done without just cause or excuse . . . What do we mean when we use the term malice aforethought? It means that there must be at least a momentary consideration before the killing. And a premeditated design to kill."

Malice aforethought has always been, and was by the charge in this case, treated as something substantively different from an intentional and unlawful killing. *Cf. State* v. *Davis*, Wash., 1940, 180 P.2d 641, 648.

Unlike the law of other jurisdictions, the Maine presumption does not "permit" the inference of malice aforethought, nor does it create a presumption that is eliminated once the defendant raises the issue.[5] The presumption is employed not simply to assist the state in its factual proof, but to shift the burden of proof onto the defendant.[6] In the light of *Winship*, the burden cannot be placed upon the defendant at least by an ordinary presumption. This is but a corollary of the familiar principle that the burden of proving every element of the crime beyond a reasonable doubt remains on the prosecution throughout the case even though the evidence is all one way and uncontradicted. *DeCecco* v. *United States*, 1 Cir., 1964, 338 F.2d 797. The presumption may substitute for evidence,[7] but if evidence itself, even though uncontradicted, cannot shift the burden of proving an element of the crime, there would appear no basis for the presumption's rising any higher.

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[4] We pass, for present purposes, the hurdle possibly presented by the fact that the case went to the jury under instructions to the clear effect that murder and manslaughter were separate crimes, and that malice aforethought is an "indispensable element of the crime of murder."

[5] The Maine law recognizes that if the defendant raises the issue of self-defense, the burden is on the state to disprove it, since a killing in self-defense is not unlawful. *State* v. *Millett*, Me., 1971, 273 A.2d 504.

While a more powerful presumption might, conceivably, be justified if based upon a fact which, if found beyond a reasonable doubt, also compels the inference beyond a reasonable doubt, *cf. Turner* v. *United States*, 1970, 396 U.S. 398, 416, no one could suggest such in this case. The Maine court simply stated.

> "That 'malice is presumed' from an intentional killing is thus, basically, only a summarizing characterization of the proposition that the law demands that the intentional killing of one human being by another must bear the heaviest penalty unless extenuated by other circumstances deemed by wise public policy relevant to the severity of punishment." 295 A.2d at 920.

The court's view of public policy cannot substitute for proof. So long as the Maine statute defines murder as

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[6] In contrast we note that presiding justices, as they are called in Maine, do not always charge in this manner. *See, e.g., State v. McCarthy*, Me., 1969, 256 A.2d 660, 663.

[7] Assuming, of course, "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary* v. *United States*, 1969, 395 U.S. 6, 36.

an intentional killing with malice aforethought, if the defendant does not agree to, *see DeCecco* v. *United States*, ante, a finding of premeditation, which petitioner here plainly did not, the burden must be upon the state to establish it. No error is more prejudicial than one which shifts, unfavorably, the burden of proof. *See Bollenback* v. *United States*, 1946, 326 U.S. 607, 614; *Carothers* v. *United States*, 5 Cir., 1947, 161 F.2d 718, 722. *Cf. United States* v. *Hayward*, D.C. Cir., 1969, 420 F.2d 142, 144-46.

One final observation. In writing this opinion we have addressed ourselves to the issue directly presented by the Maine court and argued by the parties. By so doing we do not wish to be taken as accepting the court's conclusion, had we agreed with its premise. If the legislature were to enact a statute providing that there is only one crime — felonious homicide — and that the penalty shall be life imprisonment unless the defendant establishes that the killing was not premeditated, we would question whether a formula which imposed on the defendant a factual issue determinative of the length of sentence would be any more acceptable than when used to establish an element of the crime. As the Court made clear in *United States* v. *Tucker*, 1972, 404 U.S. 443, constitutional principles are applicable to both aspects. A presumption too weakly based to support a finding of guilt would seem equally unavailable to determine sentence. We need not presently pursue this matter, but we must have grave doubts whether the device of assuming the worst and requiring the defendant to extricate himself would better the situation.

The order of the district court is affirmed.

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D. C. 20543

JAN. 14, 1974

Richard S. Cohen, Esq.
Dept. of Attorney General of Maine
State House
Augusta, Maine 04330

RE: MULLANEY, ET AL. v. WILBUR,
No. 72-1462,

Dear Sir:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the United States Court of Appeals for the First Circuit for further consideration in light of *State v. Lafferty*, Me., 309 A2d 647 (1973).

Very truly yours,
MICHAEL RODAK, JR., Clerk

By
Helen Taylor, (Mrs.)
Assistant Clerk

Sumner T. Bernstein, Esq.
Bernstein, Shur, Sawyer & Nelson
One Monument Square
Portland, Maine 04111

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 72-1348

STILLMAN E. WILBUR, JR.
Petitioner, Appellee

v.

GARRELL S. MULLANEY, et al.
Respondents, Appellants

OPINION ON REMAND

April 30, 1974

(The above Opinion of the First Circuit Court of Appeals is reproduced in the Appendix to the printed petition for certiorari, Docket No. 74-13, at pages A-1 through A-17.)

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 72-1348.

STILLMAN E. WILBUR, JR.,
Petitioner, Appellee,

v.

GARRELL S. MULLANEY ET AL.,
Respondents, Appellants.

JUDGMENT

Entered April 30, 1974

This cause was submitted on briefs after the judgment of the Supreme Court of the United States vacating the prior judgment of this court and remanding the cause to this court for further consideration,

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment affirming the order of the district court is reinstated.

In light of the length of time that this proceeding has been pending, mandate is ordered forthwith. The matter of release on bail is referred to the district court, with the recommendation that it allow same, irrespective of whether respondent proposes to petition for certiorari, unless the state proposes to retry petitioner at an early date. Costs on this and the prior appeal to petitioner.

By the Court:
/s/ Dana H. Gallup
Clerk.

[cc: Messrs. Arey and Rubin.]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 72-1348.

STILLMAN E. WILBUR, JR.,
Petitioner, Appellee,

v.

GARRELL S. MULLANEY ET AL.,
Respondents, Appellants.

ORDER OF COURT

Entered May 7, 1974

In response to respondents' motion for recall of mandate, it was, and is, the intention of this court to permit the district court to amend its prior order with respect to the time of retrial of petitioner, in its discretion, but with the adjuration to that court that if it does so, it give most serious consideration to petitioner's interim release on such terms as it sees fit.

The mandate is hereby recalled and reissued constructively for this limited purpose.

By the Court:
/s/ Dana H. Gallup
Clerk.

[Cert. c. Clerk, U.S.D.C., Maine; cc: Messrs. Arey and Rubin.]

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D. C. 20543

October 15, 1974

Richard S. Cohen, Esq.
Deputy Attorney General
of Maine
State House
Augusta, Maine 04330

RE: MULLANEY v. WILBUR

No. 74-13

Dear Sir:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,
MICHAEL RODAK, JR. Clerk
By
(Mrs.) Helen K. Loughran
Assistant Clerk

AIR MAIL
Encls.

Supreme Court, U. S.
FILED
AUG 22 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1973

No. 74-13

GARRELL S. MULLANEY, ET AL.,
Petitioners

v.

STILLMAN E. WILBUR, JR.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

HERBERT H. SAWYER
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GARRELL S. MULLANEY, ET AL.,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.

GARRELL S. MULLANEY, *ET AL.*,
Petitioners

v.

STILLMAN E. WILBUR, JR.,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The Respondent, Stillman E. Wilbur, Jr., respectfully prays that the petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on April 30, 1974, be denied.

Petitioners adequately set forth the citations to the opinions below and the jurisdiction of this Court in their petition.

QUESTIONS PRESENTED

1. Is it a violation of Due Process of Law to create a presumption of malice aforethought in a murder case and to place the burden of proof on the Defendant to prove by a preponderance of the evidence that there was no malice aforethought and that the killing was done in the heat of passion on a sudden provocation so as to reduce the crime committed from murder to manslaughter?

STATUTORY PROVISIONS

Maine Revised Statutes, Title 17:

§2651. Definition (MURDER)

Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.

§2551. Definition (MANSLAUGHTER)

Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, or, being under the legal duty to care and provide for any child or other person, willfully fails or neglects to provide for such child or other person necessary food, clothing, treatment for the sick or other necessities of life, thereby causing or hastening the death of such child or other person, or commits manslaughter as defined by the common law, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years, except that if there is a violation of Title 29, Sections 1315 or 1316, no prosecution for manslaughter shall lie.

STATEMENT OF THE CASE

The Petitioners' statement of the case needs to be amplified in certain respects.

The progression of the State trial judge's charge makes it quite clear that he instructed the jury that, when the State has proven an unlawful killing, there arises a presumption of malice aforethought which the jury must accept unless the Respondent proves that there was no malice aforethought because the killing took place in the heat of passion upon sudden provocation.

On Page 526 of the Jury Charge, the judge charged:

> . . . if you find the State has proven beyond a reasonable doubt that the Defendant committed a homicide, (you may) decide whether the homicide was murder or manslaughter.

The trial judge went on to say that the State must prove, beyond a reasonable doubt, that the victim is dead, that he was killed, that the killing took place in Franklin County, that the death took place on January 30, 1966, that the Defendant killed the victim, and, "finally" (Jury Charge, p. 530), that it was an unlawful killing. (Jury Charge, p. 526-30.)

Nowhere in those five pages does the judge say that the State must prove malice aforethought beyond a reasonable doubt or, in other words, the lack of heat of passion upon sudden provocation. In effect, he was saying that if the jury is satisfied, beyond a reasonable doubt, of the facts enumerated

above, then the State has satisfied its burden of proving beyond a reasonable doubt that a crime has occurred and then different rules apply for the jury to determine whether the crime is murder or manslaughter.

After explaining the difference between murder and manslaughter and defining malice aforethought, the trial court instructed the jury as follows:

> Malice aforethought is presumed to be present in all homicides until the contrary appears from circumstances of alleviation to be made out by the Defendant, or arising out of the evidence produced in the case. (Jury Charge, p. 538.)

The Court placed the burden of proof on the Defendant to establish the lack of malice aforethought by a preponderance of the evidence by showing that the killing occurred in the heat of passion upon sudden provocation.

Furthermore, the court charged the jury that it must find the Defendant guilty of murder if he does not satisfy his burden of proof.

> . . . if the unlawful killing was proved by the State beyond a reasonable doubt, and if there was nothing in the circumstances to explain anything palliating, then you'd find the Defendant guilty of murder, because it would be presumed to have been done with malice aforethought. (Jury Charge, p. 540-41.) (Emphasis added.)

Thus, the court charged the jury that the presumption is rebuttable initially but becomes conclusive absent any facts to the contrary. Thus, it is clear that the court did not charge the jury that only an inference is created which, in its sole discretion, the jury may or may not adopt.

It is Respondent's contention that this charge violated the Fourteenth Amendment.

The Honorable Edward T. Gignoux, United States District Court Judge for the District of Maine, upheld Respondent's contention.

The First Circuit Court of Appeals affirmed Judge Gignoux's ruling in a very perceptive opinion which reviews the history of law in Maine.

After this Court remanded this case to the First Circuit Court of Appeals, for further consideration in light of State v. Lafferty, 309 A.2d 647 (Me. 1973), the First Circuit affirmed its earlier decision, but on different grounds. The First Circuit turned the last paragraph of its first decision from dictum into holding. In its first decision, the First Circuit had stated that even accepting the Maine Court's premise, a serious question is presented "whether a formula which imposed on the defendant a factual issue determinative of the length of sentence would be any more acceptable than when used to establish an element of the crime." As the First Circuit explained in its decision on remand, the issues of "heat of passion","causation" and "sudden and adequate provocation" are clearly factual issues necessary to a finding of manslaughter and it is a violation of due process to impose the burden of proof as to those issues on a defendant.

REASONS TO DENY THE WRIT

1. IN RE WINSHIP CLEARLY REQUIRES THE STATE TO PROVE OR DISPROVE THE FACTUAL ISSUES OF HEAT OF PASSION AND SUDDEN PROVOCATION BEYOND A REASONABLE DOUBT BECAUSE THEY ARE ESSENTIAL FACTORS RELATING TO A DEFENDANT'S CONVICTION OF MANSLAUGHTER OR MURDER AND, THEREFORE, NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

This Court held, in In re Winship, 397 U.S. 358, 364, the following:

> . . . we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Every court, since Winship, other than the Maine Court, that has considered the question of placing the burden of proof on the defendant to rebut the

presumption of malice aforethought and to prove heat of passion upon sudden provocation has recognized that the holding of Winship renders the presumption unconstitutional. State v. Cuevas, 53 Haw. 110, 488 P.2d 322 (1971); People v. Morrin, 51 Mich. App. 301, 187 N.W.2d 434 (1971); Commonwealth v. O'Neal, 441 Pa. 17, 271 A.2d 497, 499 n.1 (1970). In Morrin, the court said:

> The prosecution must always prove the defendant guilty beyond a reasonable doubt; a rule of law that shifts the burden of proof with respect to "malice" tends to cloud the dimensions of the prosecutor's ultimate burden. 187 N.W.2d at 442.

In order to determine whether the issue on the merits presents a substantial federal question, it is necessary to examine the relationship of the Maine's Court analysis to the rationale underlying Winship.

The Maine Court has said that "malice aforethought", "heat of passion" and "sudden provocation" are only relevant to the punishment which is pronounced. However, it is still a jury function and not a court function to decide the question of whether those facts existed at the time of the act. Such findings are fundamental and essential to a determination that a person is guilty of murder or manslaughter. Because of the interpretation adopted by the Maine Court, the process of determining the existence of the above factors is not in any way similar to the other matters relevant to the sentencing process. A finding of heat of passion, sudden provocation or malice aforethought is just as crucial to the ultimate resolution of the case as any element of the crime.

This Court, in explaining the rationale behind the ruling in Winship explained:

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. 397 U.S. at 363.

A conviction of murder certainly results in a greater stigma than a conviction of manslaughter and

also results in a longer sentence.[1] The sentencing process under the circumstances of this case, as articulated by the Maine Court, is fundamental to the criminal process. The underlying purpose of Winship is applicable to the issues of malice aforethought, heat of passion and sudden provocation even in the context given to the concepts by the Maine Court. Where a part of the sentencing process is an integral part of the criminal process and one's personal liberty is "vitally affected", due process requires that the Defendant have no burden of persuasion. Cf. United States v. Carrol, 436 F.2d 272 (D.C. Cir. 1970).

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[1] In State v. Ferris, 249 A.2d 523 (Me. 1969), the Maine Court held that even though the matter of aggravation in an assault and battery case is only relevant to the question of punishment, it can have a significant impact on the sentence that a defendant receives. Therefore, the issue should be decided by a jury and the state should have the burden of proving aggravation beyond a reasonable doubt. Thus, in another area, the Maine Court has applied the Winship standard to a question of punishment.

As the Court below stated in its opinion:

> Whether a defendant is to be regarded as a murderer, to spend his life in prison, or, as guilty of manslaughter, is to serve a term of years, with the possibility of parole--or possibly only fined--depends upon the absence, or existence, of certain facts. We cannot accept that simply by calling them "reductive factors" the determination of these facts occurs other than "during a criminal prosecution." Were it otherwise, the important interests that concerned the Court in *Winship* could be diluted to whatever degree judicial or legislative draftsmen might elect.

The implications of not applying *Winship* to this case are far reaching. If the State succeeds in its contention, then there is nothing to stop a state from defining its crimes in such a way as to remove those elements always thought to be an element of the crime and thus frustrate the fundamental principles of our criminal justice system.[2]

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[2] It is interesting to note that if a person is only charged with voluntary manslaughter, then the State must prove that the killing took place in the heat of passion upon sudden provocation. Under these circumstances, heat of passion and sudden

Thus, it appears that *Winship* is clearly applicable to the facts of this case even under the construction adopted by the Maine Court. The issue does not present a substantial Federal question.

2. THE TRIAL COURT'S CHARGE VIOLATES THE STATE LAW REQUIREMENTS CONTAINED IN *STATE V. LAFFERTY* AND, THEREFORE, THE JUDGMENT BELOW IS SUPPORTABLE ON INDEPENDENT STATE GROUNDS, THUS RENDERING THE CONSTITUTIONAL ISSUES NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The trial court charged the jury that "the State must prove that the killing was an intentional killing." (Jury Charge, p. 528.) The court addressed the question of intention briefly and then said, "and I am going to leave for now my

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provocation must be proved by the State. However, when the State charges a person with murder, it is trying to place the burden of proof on a defendant to prove those factual matters in order to reduce the crime to manslaughter. The State could always avoid assuming the burden of proof by charging murder in every case and making the defendant prove it was manslaughter rather than only charging manslaughter and thus having the burden of proof on heat of passion and sudden provocation.

suggestion--my language concerning what the jury finding of what the defendant intended. I will be back to that later." (Jury Charge, p. 530.)

Eventually, the court redirects its attention to the requirement of intention by discussing the concept of "malice aforethought" which it defines for the jury as being either a "premeditated design to kill" (express malice) (Jury Charge, p. 535), or "any deliberate cruel act committed by one person against another suddenly or without a considerable provocation" (implied malice) (Jury Charge, p. 538). However, the court then says:

> Malice aforethought is presumed to be present in all homicides until the contrary appears from circumstances of alleviation to be made out by the defendant. (Jury Charge, p. 538.)

Thus, the requirement of intention as defined by express or implied malice is presumed until the contrary is shown by the defendant.

In State v. Lafferty, supra, the Maine Supreme Court, through the concurring opinion of Justice Wernick, defines "intentional" as being the subjective intent to kill or such actions which, when objectively viewed, have a high death producing potential. He separates this definition of intention from the concept of malice aforethought. In other words, he has transferred what has historically been included in the concept of malice aforethought to a separate and distinct concept of intention. Compare State v. Lafferty, supra with State v. Merry, 136 Me. 243, 248 (1939); State v. Neal, 37 Me. 468, 469-70 (1854).

Thus, pursuant to Justice Wernick's analysis, the State must prove beyond a reasonable doubt that there was a subjective intent to kill (premeditation) or, when objectively viewed, actions with a high death producing potential.

However, in the trial court's charge in this case, the court charged that said intent, which was encompassed within the term "malice aforethought", was to be presumed until the Defendant proved otherwise. In doing so, the trial court violated the requirements set forth by Justice Wernick in Lafferty, supra. Since the independent concept of intention as announced in Lafferty was included historically within the concept of malice aforethought, the Maine Supreme Court had no occasion to discuss the issue separately in its original decision of State v. Wilbur, 278 A.2d 139 (Me. 1971). Because the trial court violated the state law rules set forth in Lafferty, the judgment of the First Circuit is correct on the basis of state law alone. Thus, it would be inappropriate for this Court to grant certiorari and decide constitutional issues which are not necessary to the resolution of the case.

CONCLUSION

For all of the above reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the Rules of the Supreme Court of the United States, the undersigned, counsel of record for the Respondent, on the date written below, did deposit a copy of the above brief in opposition to the petition for a Writ of Certiorari in the United States Post Office at Portland, Maine, first class postage prepaid, addressed to Petitioner's attorney as follows: Richard S. Cohen, Esquire, Deputy Attorney General, State House, Augusta, Maine, 04330.

Dated: August 20, 1974.

Herbert H. Sawyer

Herbert H. Sawyer, Esq.
Bernstein, Shur, Sawyer
and Nelson
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Portland, Maine 04111

Supreme Court, U. S.
FILED

NOV 29 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-13

GERRELL S. MULLANEY, ET AL,
Petitioners

v.

STILLMAN E. WILBUR, JR.
Respondent

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-13

GARRELL S. MULLANEY, ET AL.
Petitioners

v.

STILLMAN E. WILBUR, JR.
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals (see Appendix to Petition for Certiorari, pages A-1 through A-17) is reported at 496 F.2d 1303. .

JURISDICTION

The latest judgment of the Court of Appeals was entered on April 30, 1974 (App. 130). On May 7, 1974, the Court of Appeals, pursuant to your Petitioners' motion for recall of mandate, recalled and constructively reissued its mandate for the limited purpose of permitting the District Court to amend its order with respect to the time of retrial of the defendant, and to consider the question of bail. (App. 131). On May 10, 1974, the District Court stayed its original order pending final disposition of this case by the United States Supreme Court (App. 6). The petition was filed July 25, 1974, and was granted October 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it violates the Due Process Clause of the United States Constitution to charge a jury, in a case of felonious homicide, that if they find on the evidence produced, from whatever source, that the State has established beyond a reasonable doubt an intentional and unlawful killing perpetrated by the defendant, the law presumes that homicide to have been committed with malice aforethought and that the burden is upon the defendant to convince them, by a preponderance of all the evidence, that the reductive factor of heat of passion on sudden provocation is present so as to warrant punishment of the felonious homicide as voluntary manslaughter rather than murder.

STATUTORY PROVISIONS INVOLVED

Maine Revised Statutes, Title 17:

§ 2651. Definition (MURDER)

> Whoever unlawfully kills a human being with malice aforethought either express or implied is guilty of murder and shall be punished by imprisonment for life.

§ 2551. Definition (MANSLAUGHTER)

> Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, * * *, shall be punished by a fine of not more than $1,000 or by imprisonment for not

> more than 20 years, except that if there is a violation of Title 29, sections 1315 or 1316, no prosecution for manslaughter shall lie.

STATEMENT OF THE CASE

At the trial of the State's case against Wilbur, the State alleged that Wilbur had inflicted such severe injuries upon the deceased with his fists and a blunt instrument, that death resulted within a few minutes. Wilbur's theory of defense was that though he had struck the deceased, it was in the heat of passion suddenly provoked by an indecent homosexual overture, and that, therefore, he had not acted with malice aforethought, and was guilty of voluntary manslaughter, not murder. The jury convicted Wilbur of felonious homicide punishable as murder.

Wilbur (hereinafter Defendant) appealed this conviction to the Maine Supreme Judicial Court. Among other allegations, not here relevant, he alleged that the Presiding Justice at his trial erred when he charged the jury to the effect that if it was satisfied that the State had proven beyond a reasonable doubt an intentional and unlawful killing, malice aforethought was "presumed" and the defendant would be guilty of murder, rather than (voluntary) manslaughter, unless he established, by a fair preponderance of the evidence, that he had killed in the heat of passion upon sudden provocation. This claim presented a single issue:

> Whether in thus placing the burden on the defendant to show, even by a preponderance of the evidence, the absence of malice aforethought, the Court denied him due process of law under the Rule of *In re Winship*, 397 U.S. 358 (1970).

The Maine Court rejected any possible *Winship* violation on two grounds. First, it saw "no occasion to anticipate" that *Winship* would be applied retrospectively. *State v. Wilbur*, Me.

278 A.2d 139, 146 (1971), (App. 91).[1] Second, the Court explained that, unlike many other jurisdictions, the State of Maine recognized the concept of a single generic offense of felonious homicide within which various degrees were fixed for the purpose of establishing punishment differentiation; these degrees or categories were denominated by the labels of murder, (voluntary) manslaughter, and (involuntary) manslaughter. Therefore, the Court felt that there would be an unwarranted extension of *Winship* if it were made to apply to the Maine presumption of malice arising from proof beyond a reasonable doubt of an *intentional* and *unlawful* killing since after such proof, the issue is no longer *guilt* or *innocence* of the crime of *felonious homicide*, but rather, what the *punishment* for the *crime* will be. In arriving at this conclusion, the Maine Court gave a comprehensive history of the law of felonious homicide as it has existed in Maine for over one hundred twenty-five years. *State v. Wilbur*, Me., 278 A.2d 139, 144-146 (1971), (App. 85 - 91).

Defendant then petitioned the United States District Court for the District of Maine for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, *et. seq.* (App. 96). Defendant claimed a violation of his constitutional rights on several grounds, only one of which was deemed to be of sufficient merit to be heard by the Court; this was his Fourteenth Amendment (due process) claim just discussed (App. 106).

In its opinion, *sub nomine Wilbur v. Robbins*,[2] 349 F. Supp. 149 (1972), the District Court rejected the theory of felonious homicide as constituting a viable part of the Maine law and proceeded to interpret the Maine criminal statutes relating to the definitions of murder and manslaughter on their face, without the aid of any State Court interpretation, concluding that *Winship* was applicable and due process violated. *Wilbur v Robbins*, 349 F. Supp. 149 152, 153 (1972), (App. 109). The State[3] seasonably appealed to the United States Court of Appeals for the First Circuit.

Prior to the decision of the First Circuit, the case of *State v. Rollins*, Me., 295 A. 2d 914 (1972) was decided. *Rollins* once again traced the history and theory of felonious homicide, as it had developed in Maine, and reaffirmed the principles announced in *State v. Wilbur*, Me., 278 A.2d 139 (1971). The *Wilbur* and *Rollins* decisions confronted the First Circuit with the following:

1. From the inception of Maine's statehood to the present the laws defining murder and manslaughter have been set forth in separate statutes.

2. However, in 1854 in the case of *State v. Conley*, 39 Me. 78, the Court, relying upon the common law and notwithstanding the statutes explicitly established as the law of Maine:

> "When a party is charged in an indictment with the crime of murder, the felony actually committed is the same, whether it has all the elements of murder in the first or second degree, or whether it is wanting in the criterion of murder and is therefore manslaughter only. The two lower degrees of felonious homicide are embraced in the higher offense." *Id.* at 88, 89.

Thus *Conley* made clear that there existed in Maine a single underlying criminal entity as at common law -- *felonious homicide* -- within which were fixed three degrees, two under the label of "murder" and a third lower degree denominated "manslaughter", for the purposes of advance punishment differentiations.[4]

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[1] *Winship* has been made retroactive by the case of *Ivan V. v. New York*, 407 U.S. 203, (1972).

[2] After the District Court Opinion but before the initial First Circuit Court Opinion, Warden Robbins was replaced by Warden Mullaney.

[3] For ease of reference, the Petitioners will be referred to throughout this Brief as the State and the Respondent as the Defendant.

[4] Maine no longer has first and second degree murder. Thus the only degrees of *felonious homicide* which now exist are murder, voluntary manslaughter, and involuntary manslaughter.

3. The statutes in Maine have never been altered by the Legislature in any manner suggestive of an intention by the Legislature to repudiate the common law concepts as held by *Conley* to be statutorily codified as the law of Maine, *i.e.* that there is a single generic offense, *unlawful (felonious) homicide*, of which degrees, for penalty purposes, are designated by the names "murder" and "manslaughter".

4. Thus the rationale which has allowed the principle that the State has the ultimate burden to prove all essential elements of any crime to exist side-by-side with the idea that the defendant must bear the ultimate burden of proof to reduce "murder" to "manslaughter" is that "murder" and "manslaughter" do not delineate separate *crimes* but are designations of the *degrees*, for the purpose of establishing penalty consequences, of a single underlying crime -- *unlawful (felonious) homicide.*

The Court of Appeals affirmed the decision of the District Court on February 14, 1973. The Court of Appeals rejected the theory of *felonious homicide* as announced by the Maine Court and went back into Maine law to point out how the Maine Court was, at best, in error in interpreting its own law and, at worst, was attempting to formulate and rely upon a novel interpretation in order to escape the requirements of *Winship.* The Court then relied upon the wording on the face of Maine's statutes relating to murder and manslaughter and upon the casual language of certain cases existing in Maine's law to supply what it thought should be the proper interpretation of Maine's homicide law. *Wilbur v. Mullaney*, 473 F.2d 943 (1973). (App. 118).

On April 26, 1973, the State filed a petition for writ of certiorari with this Court praying that a writ of certiorari issue to review the judgement and opinion of the First Circuit of February 14, 1973. This petition was assigned to Supreme Court Docket No. 72-1462. (App. 12).

After the filing of the petition for writ of certiorari by the State, the Maine Supreme Judicial Court decided the case of *State v. Lafferty*, Me., 309 A.2d 647 (1973). In substance, *Lafferty*, while noting certain exceptions, rejected the right of the First Circuit to be the final arbitor of the internal criminal law of the State of Maine; it went on to reaffirm the substative law of *felonious homicide* as announced in the earlier decisions.

As a result of the *Lafferty* decision the State, on September 26, 1973, filed a supplemental brief to their petition of certiorari which was then still pending before this Court. The supplemental brief explained the significance of the *Lafferty* decision as it related to the issue of federal/state relationships involved in the original petition. On January 14, 1974, this Court granted certiorari wherein it vacated the February 14, 1973, opinion of the First Circuit and remanded the case to the First Circuit for further consideration in light of the *Lafferty* decision. (App. 128).

In response to this Court's remand, the case was resubmitted to the First Circuit with the resultant decision, of April 30, 1974. *Wilbur v. Mullaney*, 496 F. 2d 1303 (see Appendix to Petition for Certiorari, pages A-1 through A-17).

In its decision on remand the First Circuit:

1. Accepted the position of the Maine court that there exists in Maine a single crime, to wit: *unlawful (felonious) homicide* as announced in several decisions of the Maine Court, culminating with *State v. Lafferty*, Me., 309 A.2d 647 (1973).

2. Found that *In re Winship*, 397 U.S. 358 (1970), and its holding that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged, commands that the Maine procedure of placing the burden on a defendant to mitigate, by a preponderance of the evidence, the *prima facie* case of *felonious homicide* punishable as "murder" (already proven beyond a reasonable doubt) to the *lower degree* of "(voluntary) manslaughter" violates due process of law.

3. Rejected the principle spelled out in *State v. Wilbur*, Me., 278 A.2d 139 (1971):

> "[W]e do not accept the view that] the defendant is required to do no more than generate the issue leaving the State, if it can, to negate the reductive factors by proof beyond a reasonable doubt. We are not persuaded to this view which tends to emasculate the presumption and defeat the very purpose for which sound public policy has raised it . . . [W]here under *stated conditions* the presumption of malice is raised, the burden of proof shifts to the defendant to reduce murder to manslaughter." (emphases supplied)

4. Concluded that the "burden of proof must be on the State throughout; not sometimes on the State and sometimes on the defendant."

SUMMARY OF ARGUMENT

The law of Maine recognizes the concept of a single generic offense of felonious homicide of which there are three degrees, designated as murder, voluntary manslaughter and involuntary manslaughter. These three degrees are punishment classifications for the crime of felonious homicide, and are not viewed as separate crimes in and of themselves. When an accused is proved beyond a reasonable doubt to have committed an intentional, or particularly brutal, and unlawful killing (*i.e.* not justified or excused), the question remaining for resolution by the factfinder is a determination of the appropriate penalty category within which to place the crime.

The policy of Maine law has been that intentional, or particularly brutal, and unlawful killings, once proved, will be punished most severely (*i.e.* as murder) unless the defendant can establish heat of passion on sudden provocation so as to reduce the punishment to voluntary manslaughter. However, there is nothing in heat of passion on sudden provocation which will change the criminal character of the defendant's conduct already proved, *i.e.* an intentional, or particularly brutal, and unlawful killing. The device by which the above procedure is accomplished is labeled a "presumption of malice". The "presumption of malice" is not a presumption of anything factual nor does it presume anything which is necessary to be proved in order to establish guilt in the first instance.

Further, heat of passion on sudden provocation cannot be termed an affirmative defense because the establishment of it does not negate criminality, but reduces punishment.

This procedure does not violate due process of law because it does not strike at anything which has been ranked so fundamental in our law as to be ruled essential to our concept of basic justice. The case of *In re Winship*, 397 U.S. 358 (1970) does not control because the *Winship* rationale is directed to that stage of a trial where *guilt* is being determined. The First Circuit's mechanical application of the technical considerations of *Winship* to the instant case constitutes an unwarranted extension of the rationale of *Winship* into an area where sound state policy should control.

ARGUMENT

I.

IT DOES NOT VIOLATE DUE PROCESS OF LAW TO CHARGE THE JURY IN A PROSECUTION FOR FELONIOUS HOMICIDE PUNISHABLE AS MURDER THAT MALICE IS PRESUMED UPON THE ESTABLISHMENT OF AN INTENTIONAL AND UNLAWFUL KILLING BEYOND A REASONABLE DOUBT BECAUSE PURSUANT TO THE MAINE LAW OF FELONIOUS HOMICIDE THE ISSUE UPON WHICH THE PRESUMPTION OPERATES IS NOT CRIMINALITY, BUT PUNISHMENT.

A

IN MAINE THERE EXISTS A SINGLE GENERIC OFFENSE OF FELONIOUS HOMICIDE UPON WHICH THE "PRESUMPTION OF MALICE" RELATES TO PUNISHMENT RATHER THAN CRIMINALITY.

Underlying the development of the law of homicide at the common law is a conceptualization of a single generic offense of felonious homicide within which degrees are recognized and established. See summary of the development of the law of homicide in *McGautha v. California* 402 U.S. 183, 197-203 (1971); and 4 Blackstone, *Commentaries* *176-204. This conceptualization of a single generic offense has been reflected in the law of Maine since the early days of statehood. See *State v. Conley*, 39 Me. 78, 87, 88 (1854). Such was re-examined and affirmed in the appeal of this Defendant to the Maine Supreme Judicial Court in *State v. Wilbur*, Me., 278 A.2d 139, 144 (1971), (App. 85). and has been further amplified and explained in *State v. Rollins*, Me., 295 A.2d 914 (1972) and *State v. Lafferty*, Me., 309 A.2d 647 (1973). The application of the concept of a single generic offense is demonstrated by the following:

Under existing Maine law murder and manslaughter are not separate and distinct crimes but are instead separate punishment categories representing different degrees of seriousness for penalty purposes of the single generic offense of felonious homicide.[5]

The punishment category of murder encompasses those felonious homicides in which the defendant either causes the death of another having a specific subjective intention that the death result from his conduct or that the defendant causes the death of another by conduct which, when objectively evaluated, is characterized by a high death producing potential. Additionally, such felonious homicides are described as being with "malice aforethought", a term of art having no independent meaning or viability apart from expressing a public policy judgment that such felonious homicides have attributed to them the highest degree of blameworthiness for purposes of severity of punishment.

The punishment category of voluntary manslaughter, like the punishment category of murder, encompasses those felonious homicides committed either by the defendant having a specific subjective intention to have death result from his conduct, or by the high objective tendency of the defendant's conduct to produce death. However, the actual subjective intention to have death result, or the deliberate cruel conduct, is generated by heat of passion upon sudden, (adequate) provocation. The presence of heat of passion on sudden, (adequate) provocation is as a matter of public policy, a palliating feature which attributes to such felonious homicides a lesser degree of blameworthiness for purposes of severity of punishment. Consequently, felonious homicides which contain this palliating element are not punishable as murder, but instead are punishable as voluntary manslaughter, and are characterized as being without "malice aforethought".

The punishment category of involuntary manslaughter encompasses those felonious homicides constituting manslaughter as defined by the common law. Such felonious homicides are spawned from conduct which does not embody either actual subjective intent to kill or an objectively characterized high death-producing potential. They are unintended killings which occur while doing some lawful act in a criminally negligent manner or while doing some unlawful act, not amounting to a felony, which is *malum in se* or *malum prohibitum*, but if the latter it must be at least the proximate cause of the homicide. See *State v. Conley*, 39 Me. 78, 87 (1854); *State v. Pond*, 125 Me. 453, 456, 134 A. 572 573 (1926); *State v. Hamilton*, 149 Me. 218, 239, 100 A.2d 234, 244 (1953); 40 Am. Jur. 2d, *Homicide*, §70; and Anderson, *Wharton's Criminal Law & Procedure*, §289 (1957). Felonious homicides found in the involuntary manslaughter punishment category present the least degree of blameworthiness for purposes of severity of punishment and quite obviously are described as being without "malice aforethought." The absence of a specific subjective intention to kill or to commit an unlawful act which has a high objective tendency to produce death is the distinguishing feature between those felonious homicides punishable as involuntary manslaughter and those punishable as murder or voluntary manslaughter.

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[5] The elements of the crime of felonious homicide are: (1) that the victim is dead; (2) that the defendant killed the victim; (3) that the killing of the victim was done voluntarily by the defendant--that is, that the physical act or acts which caused the death were the results of an exercise of the defendant's will, as opposed to reflex or non-volitional acts; and (4) that the killing of the victim was unlawful (because it was neither justifiable nor excusable).

This careful separation of the punishment categories lays bare the fact that murder and voluntary manslaughter have a special interrelationship wherein involuntary manslaughter plays no part. This interrelationship arises because both murder and voluntary manslaughter are penalty categories which apply to the same kind of unlawful killing *i.e.* one which is intentional or is characterized by conduct which when objectively evaluated has a high death producing potential.[6]

Given this application of the single generic offense, the so-called "presumption of malice" is applied as follows:

The "presumption of malice" arises only where the State has proven beyond a reasonable doubt that the killing is *intentional* and *unlawful*, *State v. Rollins*, Me. 295 A.2d 914, 919, 920 (1972), or which is characterized by conduct which when objectively evaluated is deemed to have a high death producing potential and is *unlawful*.[7] Proof of such a killing beyond a reasonable doubt establishes felonious homicide punishable as murder as a matter of sound public policy. *State v. Wilbur*, Me., 278 A.2d 139, 145 (1971), (App. 89); *State v. Rollins*, Me., 295 A.2d 914, 920 (1972); *State v. Lafferty*, Me., 309 A.2d 647, 665 (concurring opinion at 671, 672) (1973). Therefore, it is the sole function of the "presumption of malice" to place upon a defendant the burden of reducing a *prima facie* case of felonious homicide punishable as murder, proven beyond a reasonable doubt, to the lower punishment category of voluntary manslaughter by establishing by a preponderance of the evidence that though the unlawful killing remains intentional, or particularly brutal, it was the product of heat of passion on sudden provocation. Heat of passion on sudden provocation consists of a set of facts having nothing to do with the facts necessary to establish an unlawful homicide (*i.e.* not justified or excused) or the facts necessary to establish intentionality, or particular brutality. However, the facts which would establish heat of passion on sudden provocation may arise out of any evidence in the case, including the State's evidence

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[6] It is for this reason, that the instant case is only concerned with the method by which the jury selected the appropriate penalty category to fit the crime, murder or voluntary manslaughter.

[7] It is readily apparent that the "presumption of malice" cannot function at the level of a felonious homicide punishable as involuntary manslaughter because the requisite element of intentionality, or particular brutality, is absent.

The Maine approach of viewing the law of felonious homicide as consisting of a single generic offense is not unique. It has been the apparent approach actually taken in Louisiana since 1942 (L.S.A. - R.S. 14:29 *et seq.*) and in the recent statutory revisions in New York in 1967 (N.Y. Penal Law §§125.00 *et seq.*)[8] (McKinney's Consolidated Laws of New York, c.40); Oregon in 1971 (ORS 163.005) and Pennsylvania in 1973 (Purdon's Pennsylvania Statutes Annotated, Title 18 §§2501 *et seq.*) It is also the approach taken in the Proposed Special Draft, A.L.I. Model Penal Code (Article 210 - July 30, 1962).

B

THE PLACING OF THE BURDEN OF PROOF ON A DEFENDANT TO MITIGATE A CRIME OF FELONIOUS HOMICIDE PUNISHABLE AS MURDER TO FELONIOUS HOMICIDE PUNISHABLE AS VOLUNTARY MANSLAUGHTER DOES NOT OFFEND TRADITIONAL NOTIONS OF JUSTICE

The language of this Court has repeatedly emphasized that its "judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment . . . An important safeguard against such merely individual judgment is an alert deference to the judgment of the State court under review." *Leland v. Oregon,* 343 U.S. 790, 799 (1952) and see *Malinski v. New York,* 324 U.S. 401, 417 (1945) (concurring opinion of Frankfurter, J.). The test is whether or not the state practice "offends some principle of justice so rooted in the traditions and conscience of all people as to be ranked as fundamental." A procedure will not violate due process merely because another method may be deemed fairer or wiser than the one under consideration. *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934); *Leland v. Oregon, supra,* at 798, 799. This Court will not interfere with a state's policy with respect to burden of proof unless that policy violates some generally accepted concept of basic standards of justice. *Leland v. Oregon,* supra, at 799.

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[8] New York Penal Law 125.25 (murder) makes intentional killings under the influence of "extreme emotional disturbance" an affirmative defense to murder.

In the instant case it is clear that the Trial Justice charged the jury with reference to the law of felonious homicide as it has been outlined in this brief. The Trial Court Judge carefully instructed that there was a presumption of innocence (App. 19); that the State had to prove the whole case beyond a reasonable doubt (App. 20 - 22, 46); that the jury first had to find a homicide and if they did not the verdict would be not guilty, but if they did, the question would be is it murder or manslaughter (App. 22, 35, 56, 58, 59); that in making their determination as to the existence of a homicide, reasonable inferences of fact could be drawn (App. 23, 24); that the State must prove beyond a reasonable doubt, (1) death, (2) that the defendant killed, (3) an intentional killing, (4) an unlawful killing (App. 35 - 38); that the Defendant claimed to be guilty of only (voluntary) manslaughter (App. 39); that under certain circumstances malice may be presumed (App. 44 - 47); and finally, that the defendant did not have to take the stand or present witnesses, that the jury was to decide whether or not alleviating circumstances were present from any evidence in the case (App. 43, 44, 52). With particular

reference to the instruction on implied malice ("presumption of law") the trial judge repeatedly emphasized that guilt of an *intentional* and *unlawful* killing had to be established beyond a reasonable doubt and then the issue would become is it murder or is it (voluntary) manslaugher, the presence of absence of malice being the deciding factor on this second issue.

In the view of the Maine law, there is nothing fundamentally unfair about placing the burden on a defendant to mitigate the punishment within the context of a felonious homicide punishable as murder prosecution. Criminality is clearly established beyond a reasonable doubt by proof of an *intentional,* or particularly brutal, and *unlawful* killing, there being nothing in the factual proof necessary to establish heat of passion on sudden provocation which will negate in any fashion the defendant's legal guilt of an intentional felonious homicide.

As explained above, a so-called "presumption of malice" is not a presumption at all in the sense that anything factual is being inferred by the jury from other facts proved. Nor is the "presumption of malice" an affirmative defense, because such defenses go to the issue of legal accountability in the first instance. The "presumption of malice" is nothing more than a device by which the law will impose the most severe punishment upon defendants who are proven to have committed certain types of killings, *i.e. intentional,* or *particularly brutal,* and *unlawful* killings, unless they can convince the fact finder by a preponderance of the evidence that the severity of the penalty should be reduced.

This procedure has been dictated by a public policy evaluation that people who commit the types of killings above described should be punished most severely unless they can convince the fact finder that in spite of their *guilt* they deserve to be treated less severely because there are mitigating features to their *unlawful actions.* It is in short, nothing more than a public policy evaluation concerning the nature of punishment in relation to promoting safety and welfare. *State v. Rollins,* Me., 295 A.2d 914, 920 (1972).

To find that the procedure employed pursuant to the Maine "presumption of malice" violates due process without analyzing its true impact and operative effect would be to rule that due process is violated, not by the operation of a so-called "presumption of malice", but merely by the fact that for lack of a better term the State law chooses linguistically to designate this public policy by the term "presumption of malice".

C

THE FIRST CIRCUIT COURT OF APPEALS ERRED IN APPLYING THE STANDARDS OF *IN RE WINSHIP*, 397 U.S. 358 (1970) TO THE INSTANT CASE.

It is axiomatic that due process protects the accused from conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). *Winship* points to the "vital role" which the requirement of proof beyond a reasonable doubt has played in our criminal procedure, providing concrete substance for the presumption of innocence and protecting important interests which the accused has at stake in a criminal prosecution, namely potential loss of liberty and the stigma which attaches to conviction. *In re Winship*, *supra*, at 363. However, *Winship* is wholly concerned with a situation where a determination of guilt is being made in the first instance, and does not address itself to due process requirements relative to penalty determination. It is for this reason that the Maine Supreme Judicial Court stated relative to the instant case, "We see no occasion to anticipate that *Winship* will be so extended as to reach the procedural requirements of *Conley* and *Knight* as now interpreted . . . ." *State v. Wilbur*, Me. 278 A.2d 139, 146 (1971) (App. 91). In its opinion of April 30, 1974, the First Circuit Court of Appeals after acceding to the Maine conceptualization of a single generic offense, went on to rule that the *Winship* requirement of proof beyond a reasonable doubt operates so as to prevent the State from imposing a burden of persuasion on a defendant to mitigate felonious homicide punishable as murder to felonious homicide punishable as (voluntary) manslaughter. *Wilbur v. Mullaney*, 496 F.2d 1303, 1305 (1974), (App. to petition for certiorari, pages A-8, A-15, A-16.) This is in the view of the State of Maine an unwarranted extension of the *Winship* decision.

Maine law obviously recognizes and applies the fundamental rule that an accused is presumed innocent until that presumption is overcome by evidence of guilt beyond a reasonable doubt. *State v. Jewell*, Me., 285 A.2d 847, 849 (1972). This fundamental rule is recognized and applied within the theory of felonious homicide. As has been enunciated previously, the law of Maine demands that the State convince the fact finder beyond a reasonable doubt of felonious homicide punishable as murder by establishing an *intentional*, or particularly brutal, and *unlawful* killing beyond a reasonable doubt. The so-called "presumption of malice" then operates not to presume guilt or any fact necessary to a determination of guilt, but to place the burden on the defendant to convince the jury that the punishment for the criminal act proven should be reduced. Thus, full force and effect is given to the constitutional presumption of innocence and its accompanying requirement of proof beyond a reasonable doubt at the level of guilt determination.

The First Circuit Court of Appeals while apparently recognizing the above, went on to consider what it deemed to be the substantive effect of Maine's procedure. In so doing, the Court focused upon the potential stigma and loss of liberty which a criminal defendant faces during a criminal prosecution, concluding therefrom that the same potentials for harm exist in fact finding procedures relative to punishment determination as exist in fact finding procedures relative to guilt determination and that therefore the principles of *Winship* should apply to both. *Wilbur v. Mullaney*, 496 F.2d 1303, 1306, 1307 (1974). (App. to petition for certiorari pages A-12 through A-15). The Court citing *Barnes v. United States*, 412 U.S. 837 (1973), made it clear that it found constitutionally acceptable a procedure which would force a defendant to generate an issue or allow the jury to draw inferences from the evidence in the absence of explanation, but rejected any procedure which placed a burden of persuasion on the defendant. *Wilbur v. Mullaney, supra,* 1307. (App. to petition for certiorari, pages A-15, A-16).

The above analysis of the First Circuit ignores the fact that the interests of the accused being protected in *In re Winship* was the stigma and potential loss of liberty resulting from a *criminal conviction.* It has been made clear in the Maine law that at the point in time where the burden is placed on a defendant to mitigate, criminality has attached and the defendant, whether he be found guilty of murder or (voluntary) manslaughter, will still be guilty of having committed an *intentional,* or particularly brutal, and *unlawful* homicide. *State v. Rollins,* Me., 295 A.2d 914, 919 (1972). In quantitative terms the stigma which attaches to the defendant must be said to arise primarily from the fact of conviction for an *intentional* and *unlawful* killing and not from the fortuitous presence or absence of the palliating factor of heat of passion on sudden provocation.

When the First Circuit directed itself to the problem of loss of liberty, its analysis suffered from the same defect as above. Liberty is lost by virtue of the *conviction* for an *intentional* or *unlawful* killing, not because of the presence or absence of heat of passion on sudden provocation, concededly, the maximum penalty for (voluntary) manslaughter is 20 years imprisonment, whereas the only penalty for murder is life imprisonment. However, this Court has seen fit to rule that the unfettered discretion which a sentencing body has to impose sentence, even in those situations involving life and death, is not curtailed by the due process clause since the issue involved is not guilt determination. See *Williams v. New York,* 337 U.S. 241 (1949) and *McGautha v. California,* 402 U.S. 183, 196 (1973). As it relates to the potential for loss of liberty the same considerations which control the outcome of *Williams* and *McGautha* are present in the instant case. After a finding of an *intentional,* or particularly brutal, and *unlawful* killing, the jury

is solely involved in making a penalty determination, already having resolved the question of guilt or innocence.

The First Circuit, in spite of its assertion that it has acceded to the concept of a single generic offense, has attempted to superimpose considerations that are involved with the fact finding process as it relates to a determination of guilt or innocence upon the fact finding process of penalty determination where completely different considerations of both policy and law obtain. No where is this more evident than in the First Circuit's citation of *Barnes v. United States,* 412 U.S. 837 (1973) as being indicative of the appropriate rule to be followed on the question of the burden of proof which may be placed on a defendant in a criminal case. *Barnes* represents the last in a series of cases of the character of *Tot v. United States,* 319 U.S. 363 (1943) and *Leary v. United States,* 395 U.S. 6 (1969), wherein this Court has considered the permissible use of factual presumptions (more properly called inferences) in a criminal case. In *Barnes* as well as in *Tot* and *Leary,* the jury were asked to infer one fact from another proven fact, the fact to be inferred bearing directly on an element of criminality or guilt, such as knowledge. Because of this fact, this Court has set forth careful guidelines as to when presumptions may be used and the evidentiary impact of them. For example, to "rebut" a presumption of the *Barnes, Tot* or *Leary* type the defendant must merely raise a reasonable doubt as to the existence of either the presumed or proven fact. This is precisely because the presumed fact bears directly upon the issue of guilt in the first instance.[9]

[9] In Maine pursuant to the concept of felonious homicide, the principle that different defenses may require different burdens of proof depending upon whether or not they relate to criminality is recognized. For example, in *State v. Millett,* Me., 273 A.2d 504 (1971), the Maine Court recently announced that self-defense could be raised by merely going forward and generating the issue, *i.e.* raising a reasonable doubt. This is because self-defense relates to the basic issue of guilt or innocence of an *unlawful* homicide in the first instance. See *State v. Wilbur,* Me., 278 A.2d 139, 144 n. 3 (1971). The same approach would be taken in Maine with reference to the alibi defense. See *State v. Jewell,* Me., 285 A.2d 847 (1972).

The First Circuit refused to limit the rationale of *Winship* to the context within which it was decided, that is, considerations of due process which bear upon making of a determination of guilt. Further, the First Circuit suggested by its citation of *Barnes* that under these circumstances the only burden of proof which may be placed upon a criminal defendant is the burden to go forward. In so doing, the First Circuit has found it necessary to apply the due process requirements of guilt determination on to an area of the law, *i.e.* penalty determination, where neither the holding nor the rationale of *Winship* or *Barnes* expressly or impliedly mandates such a result.

CONCLUSION

For the reasons stated it is respectfully submitted that Maine's use of the "presumption of malice" relative to felonious homicide is consistent with the Due Process Clause of the United States Constitution and that the judgment of the First Circuit Court of Appeals should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-13

GARRELL S. MULLANEY, *et al.*,
Petitioners,
v.
STILLMAN E. WILBUR, JR.,
Respondent.

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-13

GARRELL S. MULLANEY, *et al.*,
Petitioners,
v.
STILLMAN E. WILBUR, JR.,
Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

In order to put the issues in this case in proper perspective, it is necessary to amplify on the State's statement of the case by referring to certain important excerpts from the trial judge's charge.

In opening his charge, the trial judge discussed murder and manslaughter as follows:

> And I will have occasion a little later on when I describe the elements of the crimes of murder and manslaughter to speak of a situation where the law

presumes that a killing under certain conditions is with malice aforethought. (A. 20).

He then went on to say that malice aforethought "is an essential and indispensable element of the crime of murder" (A. 40) and he defined malice aforethought as follows:

> Malice includes that generally malignancy and disregard for human life which proceeds from a heart void of social duty and fatally bent on mischief. That's very ancient language, but it still is quite expressive. Malice includes that general malignancy and disregard of human life which proceeds from a heart void of social duty and fatally bent on mischief. A wrongful act, in modern language, a wrongful act known to be such and intentionally done without just cause or excuse constitutes malice at law. (A. 40)
>
> * * *
>
> What do we mean when we use the term malice aforethought? It means that there must be at least a momentary consideration before the killing. And a premediated design to kill. Remember, for there to be murder there must be malice aforethought. But that malice aforethought may be either expressed or implied. Now, I'm explaining to you what express malice aforethought means. In a moment I'll tell you what implied malice aforethought means. Express malice aforethought means that there must be at least a momentary consideration before the killing, and a premediated design to kill. (A. 41-42).
>
> * * *

> That malice aforethought is implied by law from any deliberate crual act committed by one person against another suddenly or without a considerable provocation. (A. 43)[1]

The trial judge then went on to contrast heat of passion on sudden provocation with malice aforethought in the following terms:

> And malice, even implied malice must be absent or even overcome by such heat of passion. (A. 47)
>
> * * *
>
> In our State all unlawful killings of a human being are presumed to be with malice aforethought. That is, malice aforethought is implied in all unlawful killings. And in a case where the defendant is charged with an unlawful killing of a human being, and when the jury is satisfied that the killing was an unlawful killing, then the defendant in such a case has the burden of satisfying the jury by a fair preponderance of the evidence that the killing was done on sudden provocation in the heat of passion. Then from all the evidence in the case, or I should say, if from all the evidence in this case, you are convinced by a fair preponderance of the evidence, that the killing was done on sudden provocation in the heat of passion, and if you are satisfied by a fair preponderance of the evidence that it was not done with malice aforethought, then the crime

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[1] In describing malice aforethought as an essential element of murder and in giving the concept of malice aforethought factual significance, the trial judge was completely inconsistent with the analysis of the Maine Supreme Judicial Court in *State v. Lafferty*, 309 A.2d 647, 664, 666, 672 (Me. 1973). *Lafferty* held that the crime is felonious homicide which is punishable as murder or manslaughter and therefore malice aforethought is not an element of the crime but only goes to punishment. Furthermore, *Lafferty* states that malice aforethought is not even a fact, but is only a statement of public policy.

> would be manslaughter and not murder. You see, malice aforethought and heat of passion on sudden provocation are two inconsistent things. If there is – if the crime is done with – in the heat of passion upon sudden provocation, then there is no malice aforethought. If – and if the – if you have been satisfied from all the evidence in the case by a fair preponderance of that evidence, that this offense was committed in the heat of passion upon sudden provocation, as I have defined those words, then they would not be done with implied malice aforethought and the offense would be manslaughter. (A. 62).

By charging that the two concepts of "heat of passion" and "malice "aforethought" are mutually exclusive, the trial court was saying that there cannot be a subjective intent to kill (express malice aforethought) or deliberate cruel act committed without considerable provocation (implied malice aforethought) if the killing was done in the heat of passion on sudden provocation. This description of the law is also completely inconsistent with the rule of law set forth in *State v. Lafferty*, 309 A.2d 647, 670-72 (Me. 1973). Although *Lafferty* states that the Defendant's burden of proof is only to prove heat of passion on sudden provocation which does not extinguish intent as defined in *Lafferty*,[2] the trial judge told the jury that the Defendant's burden was not only to prove heat of passion on sudden provocation, but also, in doing so, to extinguish malice aforethought which the trial judge had already defined in the same terms that *Lafferty* defined intentional. Thus, while *Lafferty* states that intent and heat of passion exist together, the trial judge said they do not.

What has really happened is that the Maine Court in *Lafferty* has stated that malice aforethought is not a fact because it has transferred the factual substance of malice aforethought from malice aforethought to its separate definition of "intentional". However, the trial judge's charge places a much heavier burden on the Defendant than even *Lafferty* imposes because the Defendant must disprove malice aforethought with its factual significance.

This statement of the underlying conflict between *Lafferty* and the charge will serve as the basis for the discussion in the argument of other possible due process violations and inconsistencies and problems which may be created by not applying *In re Winship*, 397 U.S. 358 (1970), to the facts of this case.

SUMMARY OF ARGUMENT

Although the Maine Supreme Judicial Court has recently interpreted Maine law in such a way that there is the single crime of "felonious homicide" which is punishable as murder or manslaughter, that interpretation is not binding on this Court and the charge in this case and the law of Maine, as now interpreted, even if binding, violate the Due Process clause of the Fourteenth Amendment to the Constitution.

The State's explanation of the Maine concept of felonious homicide is a sudden, new interpretation which is inconsistent with the history of the development of the law of murder and raises several questions which tend to make the concept internally and analytically inconsistent. For example, if there is *one crime* which is established by proof of an intentional and unlawful killing, then the State's primary thesis that involuntary manslaughter is included within the concept of felonious homicide is analytically incorrect. In explaining involuntary manslaughter, the State argues that "a subjective intention to kill or to commit an unlawful act which has a high objective tendency to produce death" is *absent.* However, in proving felonious homicide the State concedes that it must prove intent. If intent is absent in involuntary manslaughter, then it cannot be a part of the concept of felonious homicide. In order to preserve the integrity of Federal constitutional protections, a Federal court should not be bound to accept a recent state court interpretation of its law which is internally inconsistent and contrary to prior state law.

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[2] *Lafferty* defines "intentional" as being not only a "voluntary act", but also the actor must either have a "specific subjective intention to cause death" or the death must result from "conduct which objectively evaluated is characterized by high death producing potential. 309 A.2d at 669, 671.

Reading the trial judge's charge closely reveals that he included the *Lafferty* definition of "intentional" within the concept of malice aforethought. Since he then charged that malice aforethought is presumed, he violated the holding of *In re Winship, supra,* on the issue of intent which all parties agree is an element of the crime no matter how it is defined and must be proven by the State beyond a reasonable doubt.

Placing the burden of proof as to heat of passion on sudden provocation on the Defendant also violates the underlying rational of *In re Winship, supra.* The Court in *Winship* based its holding on the stigma which attaches to conviction of a crime and the possibility of imprisonment. The significant differences in stigma and length of incarceration between murder and manslaughter make the *Winship* rational applicable to the facts of this case, and therefore, the State should have the burden of proof as to all matters which determine whether a defendant is guilty of murder or manslaughter. Furthermore, in the past and at present, when the State only charges manslaughter, it has the burden of proof as to heat of passion on sudden provocation. However, the State can avoid that burden of proof by charging a defendant with murder and thus transfer the burden of proof on the *same* fact to the defendant. Such discretion in the State violates concepts of fundamental fairness. By placing the burden of proof on the State, whether charged with murder or manslaughter, there would be no advantage to the State charging murder.

ARGUMENT

I.

THE HISTORY OF MURDER AND MANSLAUGHTER IN MAINE IS AT ODDS WITH THE CONCEPT OF A SINGLE GENERIC CRIME OF FELONIOUS HOMICIDE WHICH ALSO PRESENTS SERIOUS QUESTIONS OF INTERNAL INCONSISTENCY.

The State, in its brief, outlines the concept of felonious homicide in Maine and states that murder and manslaughter have never been separate crimes, but are punishment categories for the single crime of "felonious homicide." *State v. Lafferty, supra*; *State v. Rollins,* 295

A.2d 914 (Me. 1972); *State v. Wilbur*, 278 A.2d 139 (Me. 1971).

In order to put this concept in its proper perspective, there are many aspects of the law of Maine which are inconsistent with the concept that there is only one crime of felonious homicide. *Wilbur v. Mullaney*, 473 F.2d 943 (1st Cir. 1973).

Indictments, in Maine, speak of murder and manslaughter but do not refer to the crime of felonious homicide. This remains true even after *Lafferty* and *Rollins*. 15 M.R.S.A. §751.

There are two separate statutory provisions which define murder and manslaughter. 17 M.R.S.A. §2651 (1964) and 17 M.R.S.A. §2551 (1964). No statute refers to the concept of felonious homicide.

Previous Maine cases have recognized that murder is a separate crime. In *State v. Merry*, 136 Me. 243, 8 A.2d 143 (1939) the Maine Court stated that "in this State degrees of murder have been abolished. The crime (murder) is now defined by statute as the unlawful killing of a human being, with malice aforethought, either express or implied." 136 Me. at 246. The *Merry* Court went on to say that when a person is charged with murder, malice aforethought must exist and must "*as any other elemental fact*, be established, not beyond all reasonable doubt, but beyond a reasonable doubt" (emphasis supplied). 136 Me. at 247-48. *See State v. Park*, 159 Me. 328, 193 A.2d 1 (1963).

As early as 1836, in the context of discussing the meaning of the Maine constitutional provision on what is a bailable offense, the Supreme Judicial Court was asked to render an opinion to the Legislature on the question of "If the Legislature shall abolish the punishment of death, will the crime of murder become, by the Constitution, a bailable offense?" *Documents of the House of Representatives*, #26, February 9, 1836. The whole premise of the Maine Court's discussion is that murder is a crime. There is no reference to murder as a component part of the crime of felonious homicide. The legislative response to this opinion, contained in Chapter 74 of the Resolves of Maine (1836-1839) at page 223, also refers to "the crimes of Treason, Murder and Arson."

The State also refers to statutes of four other states to support the Maine law of felonious homicide. However, an examination of those statutes reveals that they are a major departure from the common law concepts of murder and manslaughter. The common law in those states, prior to the new statutes being enacted, seems to run counter to the Maine law concepts that malice aforethought is not a fact[3] and that it is not an element of the crime. *Commonwealth v. O'Neal*, 441 Pa. 17, 271 A.2d 497, 499 n.1 (1970); *Commonwealth v. Wucherer*, 351 Pa. 305, 41 A.2d 574, 577 (1945); *State v. Wright*, 16 So. 366, 367, 46 La. Ann. 1403 (1844).

Examining the concept of felonious homicide as it is presently interpreted reveals a major problem of interpretation. The State argues that felonious homicide includes murder, voluntary manslaughter and involuntary manslaughter.[4] The most important element of the crime of felonious homicide is that the killing be intentional as defined in *State v. Lafferty, supra* at 669-672. Intention is an element of the crime and, under *Winship*, the State must prove, beyond a reasonable doubt, that the killing was intentional.

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[3] If malice aforethought is only a statement of policy and not a fact, there really is no need to ever have invented the concept of malice aforethought. The courts could merely have told a jury that once certain facts were proven, there arises a presumption that it is murder, unless the defendant proves otherwise.

However, in describing involuntary manslaughter, the State argues that involuntary manslaughter is an unintended killing, thus not involving either "subjective intent to kill or an objectively characterized high death-producing potential." In *State v. Pond*, 125 Me. 453, 456, 134 A.572 (1926), involuntary manslaughter is described as a killing caused by gross carelessness or negligence. If the State's position that intent is always an element of felonoius homicide is accepted, then involuntary manslaughter cannot be a degree of that "crime" because there is no intent in the *Lafferty* sense. The State attempts to avoid this inconsistency in its analysis of involuntary manslaughter by omitting "intent" in its enumeration of the elements of the crime of felonious homicide (footnote 5 on page 10 of State's brief). However, *Lafferty* clearly states that

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[4] To be consistent with the concept of a single generic offense of felonious homicide, "reckless homicide", 29 M.R.S.A. §1315 (1964) should be included within the concept. However, the elements of reckless homicide do not include the element of intent since, by definition, it must be reckless. Would the presumption of malice aforethought permit a finding of murder and place the burden of proof on the defendant to show that it was only reckless? Driving a car could certainly be construed to fit within the definition of acts with a high objective potential for death as defined in *State v. Lafferty*, 309 A.2d 647 (Me. 1973).

intent is an element of the crime of felonious homicide.[5]

Even though the above matters raise a serious question as to the strength of the foundation for the Maine Supreme Judicial Court's recent interpretations in *Lafferty* and *Rollins*, this issue was rejected by the First Circuit on remand. *Wilbur v. Mullaney*, 496 F.2d 1303 (1st Cir. 1974).

The second *Wilbur v. Mullaney, supra*, decision was handed down after this Court remanded "for further consideration in light of *State v. Lafferty*, Me., 309 A.2d 647 (1973)." (A. 128). In the first *Wilbur v. Mullaney, supra*, decision the Maine Court's interpretation of Maine law as to felonious homicide and malice aforethought was rejected by the First Circuit on the ground that "a totally unsupportable construction which leads to an invasion of constitutional due process is a federal matter."[6] 473 F.2d at 945. The First Circuit found that this was a "sudden" and "new" interpretation of Maine law. Even the Maine Court, in *Lafferty*, recognizes that "if the totality of the circumstances surrounding the State Court's recent interpretation under scrutiny establishes that it is at odds with the fundamental spirit which has always pervaded the State's law, the federal tribunal . . . may reject such recent State Court interpretations thus to preserve the integrity of federal constitutional protection." 309 A.2d at 668 and see cases cited therein. In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court also adopted a rule that a sudden, new interpretation of state law which prejudices a defendant violates due process. The First Circuit and the District Court have found, either expressly or impliedly, that the recent Maine Court interpretations could not be anticipated.

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[5] Even accepting the State's concept that involuntary manslaughter is a degree of felonious homicide, the State must first introduce sufficient evidence to prove an intentional and unlawful killing. Then the burden of proof, not the burden of going forward, as to involuntary manslaughter is placed on the defendant. The defendant must prove, by a preponderance of the evidence, that the killing was not intentional, but was committed by acts of gross negligence. Although the State claims to retain the burden of proof as to intent, it is shifted to the defendant. The defendant must do more than come forward with evidence which raises a reasonable doubt; he must prove, by a preponderance of the evidence, that the killing was unintentional.

[6] Judge Gignoux, in the District Court, also rejected the Maine Court's interpretation, stating that the concept of the crime of felonious homicide appears nowhere in the statutes and malice aforethought is "undeniably an essential element of the crime of murder." (A. 113-114).

Although there is not the same prejudice to the Defendant as there was in *Bouie*, the Maine Court did strip malice aforethought of its factual content. In doing so, the State can now argue that since malice aforethought is not a fact, the rational of *In re Winship, supra,* is inapplicable. However, the trial proceeded on the basis that it was an "essential element of the crime of murder" (A. 40) and that malice aforethought was factual in nature (A. 40, 41-42, 43). By redefining malice aforethought, the Defendant is being deprived of a federal constitutional right which is clearly applicable to the law as defined by the trial court and historical precedent. The "*ex post facto* refooting of an already existing practice may offend due process." *Comment, Due Process and Supremacy As Foundations for the Adequacy Rule: The Remains of Federalism After Wilbur v. Mullaney*, 26 U. Me. L. Rev. 37, 70 (1974).[7]

If this Court rejects the Maine Court's interpretation of its law, then malice aforethought would clearly be a fact and an essential element of the crime of murder. The State would have violated *Winship* in satisfying its burden of proof as to malice aforethought by a mandatory presumption.

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[7] Other due process violations, arising out of the differences between the law as defined by the trial court and the Maine Supreme Judicial Court may also exist. If, as the State contends, heat of passion on sudden provocation and intent are not mutually exclusive, (see p. 11-12 of State's brief), then the trial judge violated Maine law in charging that the heat of passion extinguishes malice aforethought which he had already defined as requiring a subjective intent to kill or a deliberate cruel act (implied intent) (A. 40-42, 47, 62). He defined heat of passion on sudden provocation as follows:

> "Heat of passion means more than anger. It means that at the time of the act the reason is disturbed or obscured by passion to an extent which might ordinary men of fair, average disposition liable to act irrationally without due deliberation or reflection, and from passion rather than judgment. The state of mind must be such that the suddenly excited passion suspends the exercise of judgment and dominates volition so as to exclude premeditation and a previously formed design, though of short duration. . . . Moreover, heat of passion will not avail unless upon sudden provocation. Sudden means happening without previous notice or with very brief notice; coming unexpectedly, precipated, or unlooked for." (A. 47).

By so doing, the trial judge imposed a much heavier burden of proof on the Defendant than even *Lafferty* requires. Rather than merely proving heat of passion, he must also disprove malice aforethought as factually equated with intent by the trial judge. *Comment, Due Process and Supremacy As Foundations for the Adequacy Rule: The Remains of Federalism After Wilbur v. Mullaney*, 26 U. Me. L. Rev. 37, 75 & n. 169 (1974). As the factual definition of malice aforethought becomes more stringent, the burden on the Defendant becomes more difficult. If malice aforethought has no factual substance, then it was highly prejudicial to the Defendant to give it any. Such an inconsistency with state law should be a due process violation in and of itself. If *Lafferty* is good law, then state should not be permitted to uphold a conviction which clearly violates its own law.

II.

IT VIOLATED DUE PROCESS OF LAW TO CHARGE THE JURY IN THE PROSECUTION FOR MURDER IN THIS CASE THAT MALICE AFORETHOUGHT WAS TO BE PRESUMED BECAUSE THE TRIAL COURT DEFINED MALICE AFORETHOUGHT IN TERMS OF THE CONCEPT OF INTENTIONAL WHICH IS CLEARLY AN ELEMENT OF THE CRIME WHICH THE STATE MUST PROVE BEYOND A REASONABLE DOUBT PURSUANT TO *IN RE WINSHIP*, 397 U.S. 358 (1970).

Under the concept of felonious homicide, *intent* is an element of the crime and must be proven by the State beyond a reasonable doubt. However, in the charge, the element of intent is included within the trial court's definition of malice aforethought as shown by the following excerpts:

> What do we mean when we use the term malice aforethought? It means that there must be at least a momentary consideration before the killing. And a premeditated design to kill. Remember, for there to be murder there must be malice aforethought. But that malice aforethought may be either expressed or implied. Now, I'm explaining to you what express malice aforethought means. In a moment I'll tell you what implied malice aforethought means. Express malice aforethought means that there must be at least a momentary consideration before the killing, and a premeditated design to kill. (A. 41–42).
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> * * *
>
> That malice aforethought is implied by law from any deliberate cruel act committed by one person against another suddenly or without a considerable provication. (A. 43).
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> * * *
>
> "Murder under our law is the unlawful killing of a human being with malice aforethought either express or implied. Malice aforethought does not necessarily mean that there must be a specific intent to kill. But our Court has laid down the rule as follows: In all cases where the unlawful killing is proved, and there is nothing in the circumstances of the case as proved to explain, qualify, or palliate the act, the law presumes it to have been done maliciously. And if the accused would reduce the crime below the degree of murder the burden is upon him to rebut the inference of malice, but which the law raises from the act of killing, by evidence in defense–". (A. 64-65).

The trial court then said that malice aforethought, or intent, is presumed unless the Defendant proves otherwise:

> So, if the evidence – well, so, if the unlawful killing was proved by the State beyond a reasonable doubt, and if there was nothing in the circumstances to explain anything palliating, then you'd find the defendant guilty of murder, because it would be presumed to have been done with malice aforethought. (A. 45).

Winship clearly forbids the placing of the burden of proof as to intent on anyone other than the State. The trial court did state that the State must prove intent beyond a reasonable doubt, but then he said, "I am going to leave for now my suggestion – my language concerning what the jury finding of what the defendant intended. I will be back to that later." (A. 37-38). He did come back to the question of intent, but, as shown by the above excerpts, he told the jury that, once the State proves certain facts, intent is to be presumed and the jury must return a verdict of murder unless the defendant meets his burden of proof. Thus the State satisfies its burden of proof as to intent by a presumption. Rebuttable presumptions which the jury may or may not apply are permitted under appropriate circumstances, but mandatory presumptions, such as used in this case, are not. *Leary v. United States*, 395 U.S. 6 (1969); *Tot v. United States*, 319 U.S. 363 (1943). There is no necessary connection between the proven facts and the presumed fact. A killing can just as easily be unintentional as intentional. Thus, notwithstanding the Maine Court's development of the concepts of felonious homicide and malice aforethought, the trial judge invoked a mandatory presumption on the issue of intent, thus relieving the State of its burden of proof on an element of the crime in violation of *Winship*.

In *State v. Wilbur, supra*, the Maine Court reviewed the charge and found that it complied with Maine law and did not violate any federal constitutional rights. Even if this Court decides that it must accept the Maine Court's interpretation of its law and its finding that the charge correctly applied that law, this Court must still review the charge to determine whether the Defendant

has received a fair trial. Certainly a fair trial requires that a jury be told of the rules of law in a way that clearly sets out any federally guaranteed rights. Under Maine law, intent is an element of the crime even under the concept of felonious homicide. *Winship* requires the State to prove, beyond a reasonable doubt, that the killing was intentional. It is a federal question to determine whether the charge in this case instructs the jury as to the proper allocation of the burden of proof pursuant to *Winship*. As shown above, notwithstanding that the charge may technically comply with Maine law, it certainly conveys an impression to the jury that malice aforethought, i.e. intent, is to be presumed upon proof of an unlawful killing. This charge violates the holding of *Winship*. Without reference to the charge, the State argues that the trial judge repeatedly told the jury that the State had to prove an intentional and unlawful killing, (see page 15 of State's brief). However, it is interesting to note that the jury returned twice for further instructions as to implied malice (A. 61-70) and heat of passion on sudden provocation (A. 70-77). In the further instructions on implied malice which certainly would be more clearly remembered by the jury when they returned to deliberate, the judge told them that "all unlawful killings are presumed to be with malice aforethought" (A. 61) and "when the jury is satisfied that the killing was an unlawful killing, then the defendant in such a case has the burden of satisfying the jury by a fair preponderance of the evidence that the killing was not with malice aforethought." (A. 62). He did not mention that the State must prove intention. Even in the original part of his charge, he talked about the State only proving an unlawful killing. (A. 44, 45). The trial court defined unlawful as follows:

> Finally, the State must prove that the killing was an unlawful killing. I don't need to speak much to you about that, except to remind you, of course, knowing that you are thinking of all aspects of this case, that not all killings are unlawful killings. A soldier may lawfully kill in battle. A policeman may, under some conditions, lawfully kill if necessary to apprehend and subdue a prisoner. A person may lawfully kill in some conditions in self-defense. It is for a jury to say from all the facts whether a killing, if there was one, was a lawful killing. (A. 38).

Thus it becomes quite clear that the jury would have understood that once an unlawful killing had been established, intent was to be presumed. *Winship, Tot* and *Leary* do not permit the State to satisfy its burden of proof as to intent by a presumption and therefore the charge as would have been understood by the jury violated the Defendant's constitutional rights.

III.

IT VIOLATED DUE PROCESS TO CHARGE THE JURY IN THE PROSECUTION FOR MURDER IN THIS CASE THAT THE DEFENDANT HAD THE BURDEN TO PROVE HEAT OF PASSION ON SUDDEN PROVOCATION BECAUSE IT OFFENDS NOTIONS OF FUNDAMENTAL JUSTICE AND VIOLATES *IN RE WINSHIP*, 397 U.S. 358 (1970).

The First Circuit interpreted *In re Winship, supra* to require the State to disprove heat of passion on sudden

provocation.[8] In order to evaluate the correctness of that holding, it is necessary to examine the principles underlying the reasoning of *In re Winship, supra. Winship* applied the due process clause so as to require the State to prove beyond a reasonable doubt "every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. In the present controversy, the State has attempted to distinguish *Winship* on the ground that the issues of malice aforethought and heat of passion do not bear on criminality, but only to punishment. Did *Winship* use the word crime with this distinction in mind or only because it was applicable to the facts of the case before the Court? "The latter implication seems more likely." *Comment, supra* at 81. Towards the conclusion of *Winship*, Justice Brennan cites Chief Judge Fuld's dissent in the New York Court of Appeals and holds

> "that, where a 12-year old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then as a matter of due process . . . *the case* against him must be proved beyond a reasonable doubt . . ." 397 U.S. at 368 (Emphasis supplied)

Thus it does not appear that the word "crime" should be accorded significant weight because the Court adopts the words "the case" at a later point. Furthermore, the nature of the *Winship* case refutes the State's position. *Winship* involved a charge of delinquency. The State attempted to argue that this was not a criminal proceeding. Justice Brennan rejected this argument on the basis of *In re Gault*, 387 U.S.1 (1967), and stated that "civil labels and good intentions do not themselves alleviate the need for criminal due process safeguards in juvenile courts." 397 U.S. at 365-66. Thus the holding of *Winship* was applied to a juvenile proceeding. The word "crime" should not be accorded any magical significance when determining the application of due process. This Court was concerned wth applying criminal due process standards to any judicial proceeding where justified by the facts. By examining the underlying interests justifying the application of the reasonable doubt standard to the facts of *Winship*, it becomes evident that those same interests and others compel the application of the reasonable doubt standard to the facts of this case.

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[8] The Maine Court recognized that this is the rule in the majority of jurisdictions. *State v. Wilbur*, 278 A.2d 139, 146 (1971) (A. 89).

Every court, since *Winship*, other than the Maine Court, that has considered the question of placing the burden of proof on the defendant to rebut the presumption of malice aforethought and to prove heat of passion upon sudden provocation has recognized that the holding of *Winship* renders the presumption unconstitutional. *State v. Cuevas*, 53 Haw. 110, 488 P.2d 322 (1971); *People v. Morrin*, 51 Mich. App. 301, 187 N.W.2d 434 (1971); *Commonwealth v. O'Neal*, 441 Pa. 17, 271 A.2d 497, 499 n.1 (1970). None of these courts have interpreted the common law as the Maine Court has done.

The reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship, supra* at 363. Justice Harlan, in concurring, also found the reasonable-doubt standard of

vital importance because of the necessity of reducing the chances of factual error to a minimum. *Id.* at 372-73. In the context of distinguishing between murder and manslaughter, the differences in consequences are so great that it is vital that procedure be such as to minimize the chances of error. By placing the burden of proof on a defendant to show heat of passion, the chances of error are not minimized but enlarged.

Winship was concerned with the fact that an accused could potentially be imprisoned if convicted and therefore it was important to minimize the chances of error. In Maine, a conviction of murder results in a mandatory life sentence, 17 M.R.S.A. §2651 (1964), whereas a conviction for manslaughter is limited to a maximum of twenty years with the discretion in the trial court to suspend the sentence. Although both murder and manslaughter may involve loss of liberty, the differences in the nature and extent of the incarceration are so significant that the rational of *Winship* is equally applicable. In those situations where probation is likely upon conviction of manslaughter, the difference is between freedom and imprisonment for life. *Comment, supra* at 83-84. Thus it is crucial to minimize the chances of error by applying the reasonable doubt standard to the issue of heat of passion on sudden provocation.

The State claims that *In re Winship* is not applicable to the punishment phase of the trial. However, in *State v. Ferris*, 249 A.2d 523 (Me. 1969), the Maine Court held that even though the matter of aggravation in an assault and battery case is only relevant to the question of punishment, it can have a significant impact on the sentence that a defendant receives. Therefore, the issue should be decided by a jury and the state should have the burden of proving aggravation beyond a reasonable doubt. 249 A.2d at 528. Thus, in another area, the Maine Court has applied the *Winship* standard to a question of punishment. Following the logic of *Lafferty*, there could be a rule that all assault and batteries are presumed to be of a high and aggravated nature and the defendant must reduce the crime to simple assault and battery. Such a rule would be inconsistent with the reasoning of *Ferris*. Although the State argues that due process plays no part in the sentencing process, the *Ferris* Court rejected that proposition by deciding that, because of the significant impact on sentencing that the issue of aggravation has, due process requires trial by jury in the penalty phase. 249 A.2d at 527. The Maine Court found *Duncan v. Louisiana*, 391 U.S. 145 (1968), decisive on this question. The Maine Court did not distinguish *Duncan* on the grounds that it only related to the guilt or innocence phase rather than the penalty determination phase of the trial. The reasoning of *Duncan* tends to contradict the State's position in this case. The question of the due process right to jury trial depends upon the nature of the penalty which could be assessed. If the statutorily authorized length of the sentence controls the right to jury trial, then the possible length of sentence which is determined by a particular factual issue should also control the question of whether

the state must prove or eliminate the factual issue beyond a reasonable doubt.[9]

The second interest relied upon by *Winship* is the stigma which attaches to a conviction or finding of delinquency. *In re Winship, supra* at 363, 374. Certainly the whole concept of felonious homicide recognizes the distinctions which society makes between murder and manslaughter. The "*highest* degree of blameworthiness" is attached to a conviction of murder whereas the degree of blameworthiness is significantly lessened upon conviction of manslaughter. *State v. Lafferty, supra* at 672-73. Certainly this Court can take judicial notice of the differences in societal reaction to murder and manslaughter.

One could argue that it would be very difficult for the State to prove the lack of heat of passion beyond a reasonable doubt. *State v. Wilbur, supra* at 145. However, the same difficulty is faced by the State where self-defense is in issue and yet the Maine Court has said that, once put in issue, the State must disprove self-defense beyond a reasonable doubt. *State v. Millett*, 273 A.2d 504 (Me. 1971). Furthermore, in most instances, the facts which prove that a defendant killed the victim will also reveal many of the circumstances surrounding the death which will be relevant to the issue of heat of passion on sudden provocation. Thus the State's burden is not really significantly increased. The whole theory behind the presumption of innocence is to require the State prove its case. A standard whose only purpose is to facilitate convictions runs counter to our system of criminal justice. *Wilbur v. Mullaney, supra* at 1307. This is not a case where the evidence necessary to prove the fact is contained entirely in the head of the defendant. Heat of passion on sudden provocation can be proven or refuted by external facts which both the state and the defendant have an equal chance of developing and introducing at the trial. Although heat of passion on sudden provocation may be partly subjective, objective facts are available which will support or refute the contention that a defendant was acting in the heat of passion. The type of provocation, which is an objective fact, has a direct bearing on whether the defendant was in the heat of passion. (A. 63-68). Did he act as a reasonable man would in similar circumstances? What was the provocation? What was the nature of the defendant's response? How much time separated the provocation from the response? Had the defendant sufficient time to cool off? These are all objective facts which have a direct bearing on the issue of heat of passion on sudden provocation.

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[9] Applying due process standards to this issue would not necessarily open the traditional sentencing process to due process restrictions. The issue of heat of passion on sudden provocation goes to determining the category of crime within which the traditional sentencing process operates. Thus the issue in this case is of a different magnitude than when the issues relate solely to the traditional sentencing process in which, historically, due process has had less application.

Upon examination, it becomes evident that the rational of *Winship* is applicable to the issue in this case and, therefore, the State should be required to disprove heat of passion on sudden provocation. Obviously if there is no evidence of heat of passion on sudden provocation so that manslaughter is not a permissible verdict, then the State has no burden, but where there is any evidence which would permit a finding of voluntary manslaughter, the State should have the

burden of proving beyond a reasonable doubt that the defendant is guilty of murder by disproving that the killing was committed in the heat of passion on sudden provocation.[10]

CONCLUSION

Respondent respectfully submits that the Maine Court's concept of felonious homicide is so inconsistent with the spirit of prior Maine law that it should not be binding on this Court. However, even if binding, the First Circuit correctly applied the rules set forth in *In re Winship, supra,* because the Maine concept of felonious homicide which assumes the worst and imposes the burden of proof on a defendant to prove a fact essential to the overall determination of the category of crime of which he is guilty violates the concepts of fundamental fairness protected by the Due Process Clause of the Fourteenth Amendment. Furthermore, Respondent contends that the trial judge's charge on intent creates a presumption which is forbidden by *Winship, Tot,* and *Leary*. Therefore, the judgment of the First Circuit should be affirmed.

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[10] Other due process violations are also present by placing the burden of proof on a defendant to prove heat of passion on sudden provocation when charged with murder. The Due Process Clause of the Fourteenth Amendment protects against violations of traditional notions of fundamental justice. *Palko v. Connecticut,* 302 U.S. 319 (1937). The application of the due process clause depends upon the facts of a particular case and the interests to be protected. If the State were only to charge a person with voluntary manslaughter, the burden would be on the State to prove that the killing was done in the heat of passion upon sudden provocation. 17 M.R.S.A. §2551 (1964). However, the State can completely avoid and shift the burden of persuasion on that issue by charging the person with murder. Under those circumstances, the defendant would have the burden of proving heat of passion upon sudden provocation and, if he cannot, he would be found guilty of murder. It would appear to be to the benefit of the State to always charge a person with murder because it can shift the burden of persuasion on heat of passion by doing so. This process is fundamentally unfair and can be avoided by requiring the State to prove its murder case by disproving heat of passion on sudden provocation. Under those circumstances the State would be required to make an election as to which is the proper charge to be brought and proved.

Respectfully submitted,

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